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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CITED, AND
STATUTES CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.
JOHN W. DONAKER, Ass't Reporter.

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JUDGES
OF THE
SUPREME COURT.

OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. LEONARD J. HACKNEY.* †
HON. LEANDER J. MONKS. ‡
HON. JAMES H. JORDAN. ‡
HON. JAMES McCABE. †
HON. TIMOTHY E. HOWARD. †

* Chief Justice at November Term, 1895.

† Term of office commenced January 1, 1893.

‡ Term of office commenced January 7, 1895.

OFFICERS
OF THE
SUPREME COURT

CLERK,
ALEXANDER HESS.

SHERIFF,
DAVID A. ROACH.

LIBRARIAN,
JOHN C. McNUTT.

CASES
 ARGUED AND DETERMINED
 IN THE
Supreme Court of Judicature
 OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1895, IN THE EIGHTIETH
YEAR OF THE STATE.

THE INDIANA, ILLINOIS & IOWA RAILROAD CO.
 v. LYNCH ET AL.

[No. 17,657. Filed May 6, 1896.]

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APPELLATE PROCEDURE.—*Bill of Exceptions.—Certificate of Filing.*—

A bill of exceptions must be preceded in the record by an entry showing that it was filed as such, or at least the filing must be certified by the clerk.

SAME.—*Longhand Manuscript of Evidence.—When Must be Filed with Clerk.*—The longhand manuscript of the evidence must be filed with the clerk before it is incorporated in the bill of exceptions, and within the time allowed for filing the bill of exceptions.

SAME.—*Longhand Manuscript of Evidence, by Whom Filed.—Statute Construed.*—Under section 1476, Burns' R. S. 1894 (section 1410, R. S. 1881), providing that the original longhand manuscript of the evidence may be filed with the clerk by the "party entitled to the use of the same," The failure of the official stenographer to file the manuscript will not excuse the party whose duty it was to have it filed.

From the Lake Circuit Court. *Affirmed.*

T. S. Fancher, for appellant.

J. B. Peterson, for appellees.

Indiana, Illinois and Iowa Railroad Co. v. Lynch *et al.*

HOWARD, J.—In April, 1882, Harriet Gale brought suit in attachment against McGillis & Hogan, contractors, and in the same suit instituted garnishee proceedings against the appellant company. The suit remained on the docket of the court for several years undisposed of. In 1891 the appellee Lynch brought suit in attachment and garnishment against the same parties, filing under the original suit as provided by statute, and obtained judgment against appellant. In June, 1891, execution was issued on this judgment, and served in January, 1892, upon the agent of the company in said county. No property was taken under the first execution. In December, 1893, a second execution was issued on the judgment, and again served upon appellant's agent. On February 14, 1894, this action was brought by appellant to vacate the judgment obtained by appellee, or to have the same opened up and appellant permitted to defend against it. The cause was submitted to the court, and there was a finding and judgment against appellant. The only error assigned on this appeal, or discussed by counsel, is that the court erred in overruling the motion for a new trial.

The action under which appellee's judgment was taken was allowed by appellant to remain on the docket of the trial court for over eight years before the alleged fraud in obtaining it is said to have been committed; and it was over three years from the entry of the judgment, so alleged to have been obtained, before this suit was brought to set it aside. Were we, therefore, to consider the case upon its merits, as contended for by appellant, it would seem, according to the holding of this court in the well considered case of *Hollinger v. Reeme et al.*, 138 Ind. 363, that appellant had not shown that diligence always necessary in a

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successful attack upon a judgment alleged to have been procured by fraud.

The determination of the questions presented, however, requires a consideration of the evidence adduced on the trial; and we are met with the contention of appellee that this evidence is not in the record by bill of exceptions.

The judgment against appellant refusing the injunction prayed for, was rendered February 26, 1895; and appellant was given sixty days within which to file its bill of exceptions. There is a paper attached to the record which is entitled a bill of exceptions, but it is not preceded or introduced by an entry or recital, such as indicated in *Miller, Adm.*, v. *Evansville, etc., R. R. Co.*, 143 Ind. 570, and authorities there cited, as proper to show the filing of a bill of exceptions. Neither is there any certificate by the clerk to show such filing. *Morgan v. East*, 4 Ind. App. 507; *Board, etc., v. Huffman*, 134 Ind. 1; *Elliott App. Proced.*, section 805.

But, even more serious, perhaps, it is positively shown by the certificate of the clerk that the long-hand manuscript of the evidence was not filed in the clerk's office until long after the expiration of the time allowed for the filing of the bill of exceptions. The sixty days given for the filing of a bill of exceptions expired on the 27th of April, 1895. As the longhand manuscript must be filed in the clerk's office before it is incorporated in a bill of exceptions, it is plain that to be a part of the bill it was necessary that the manuscript should have been filed with the clerk before April 27, 1895. *Mason v. Brody*, 135 Ind. 582; *Smith v. State*, *post*, 176.

The clerk's certificate is as follows: "And I further certify that on May 25, 1895, S. P. Corboy, the official reporter of said court, who took down the evi-

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dence in said cause, filed in my office his longhand manuscript thereof, which is the same manuscript incorporated in the foregoing bill of exceptions."

The longhand manuscript of the evidence having therefore been filed with the clerk nearly a month after the time given to prepare the bill of exceptions and present the same to the judge, the evidence is not in the record. It may be noticed also, that the statute does not provide that the longhand manuscript shall be filed by the reporter, but "by the party entitled to the use of the same." Section 1476, R. S. 1894 (section 1410, R. S. 1881); Acts 1873, p. 194; *Galvin v. State, ex rel.*, 56 Ind. 51. It is the duty of a party appealing to see to it that a correct record is brought to this court. Certainly the statute and the numerous decisions of this court have made it very plain how this shall be done. Counsel should not trust this duty to inexperienced officials.

No question being presented on the record, the judgment is affirmed.

 DAVIS v. DAVIS ET AL.

[No. 17,719. Filed May 6, 1896.]

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NEW TRIAL.—Complaint.—Newly Discovered Evidence.—In an action to obtain a new trial, on the ground of newly discovered evidence, all the facts essential to the validity of the complaint must be set out in the body of the complaint. The pleadings and evidence in the original case, though referred to and made a part of the complaint, cannot be considered.

SAME.—Complaint.—Newly Discovered Evidence.—Due Diligence.—A complaint in an action for a new trial, on the ground of newly discovered evidence, must state the facts constituting the diligence used to obtain the evidence before the trial. The mere statement that inquiries were made, is not sufficient.

SAME.—Complaint.—Newly Discovered Evidence.—In an action for a new trial, by reason of newly discovered evidence, where a deposi-

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tion of a witness introduced in the original cause has been lost, an allegation in the complaint that such deposition is lost, with a substantial statement of the evidence, is sufficient; but such averments must be established by proper evidence at the trial of the issues joined on the complaint for a new trial.

From the Madison Circuit Court. *Reversed.*

F. A. Walker, F. P. Foster, W. S. Diven, and E. B. McMahan, for appellant.

Goodykoontz & Ballard, and *H. C. Ryan*, for appellees.

MONKS, J.—Appellees brought this action against appellant to procure a new trial, on account of newly discovered evidence, of a cause in which appellant recovered a judgment against appellees.

Appellant filed a demurrer for want of facts to the complaint, which was overruled. The cause was tried and resulted in a finding and judgment in favor of appellees, that a new trial of said cause be granted, etc. The errors assigned call in question the action of the court in overruling the demurrer to the complaint, and in overruling appellant's motion for a new trial.

In determining the sufficiency of the complaint the pleadings and evidence in the original case, which are made a part thereof, cannot be considered. Neither the evidence nor pleadings in the original case can be resorted to for the purpose of supplying any averments essential to the sufficiency of the complaint; all the averments essential to the validity of the complaint must be set out in the body of such complaint or the same will not be sufficient to withstand a demurrer for want of facts. *Anderson v. Hathaway*, 130 Ind. 528 (529); *Morrison v. Carey*, 129 Ind. 277 (279); *Shewalter v. Williamson*, 125 Ind. 373 (374); *Hines v. Driver*, 100 Ind. 315 (324).

The character of the action and the materiality of

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the newly discovered evidence must be set forth in the body of the complaint, and not left to inference from the pleadings and evidence in the original case, made a part thereof. *Anderson v. Hathaway, supra*, and cases cited on p. 529.

The rule is established beyond controversy that applications for a new trial for newly discovered evidence are viewed with disfavor by the courts. They should be received with great caution, for the reason that there are few causes tried in which something may not be hunted up after the trial, and it extends great temptation to the commission of perjury to admit new evidence after the party who has lost a verdict has had an opportunity of discovering his adversary's strength and his own weakness. The law favors the diligent. A party, therefore, seeking a new trial on account of newly discovered evidence must, if he would succeed, establish every element of his case strongly, clearly, and satisfactorily, both by allegation and proof.

The facts constituting the diligence used before the trial to obtain the evidence must be pleaded. If it consisted in making inquiries, the time, place and circumstances must be stated, that the court may know that the inquiries were made in the proper quarter and in due season. *Osgood v. Smock*, 144 Ind. 387, and cases cited; *Anderson v. Hathaway, supra*; *McDonald v. Coryell*, 134 Ind. 493, and cases cited on p. 494; *Hines v. Driver, supra*.

Applying the well settled rules to the complaint in this case, it is clearly insufficient. There were no facts averred in the complaint, showing the nature of the original action, or that the alleged newly discovered evidence was material to any issue in the cause. Whether the same was material might perhaps be determined by a resort to the pleadings in the original

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case which are a part of the complaint, but as we have said, they cannot be considered for any such purpose. *Blackburn v. Crowder*, 110 Ind. 127, and cases cited *supra*. Neither do the allegations in the complaint show proper diligence on the part of appellees to discover and procure the evidence of the witnesses named, prior to the trial in which the judgment sought to be vacated was rendered.

The diligence alleged, consisted in making inquiries of two witnesses before the trial, but it is not alleged how long before the trial, or when, or where, or under what circumstances such inquiry was made.

These allegations were not sufficient, therefore, for the court to determine whether the inquiry was made in the proper quarter or in due season. *McDonald v. Coryell*, *supra*; *Morrison v. Carey*, *supra*; *Graham v. Payne*, 122 Ind. 403; *Schnurr v. Stults*, 119 Ind. 429.

It is urged that the complaint is not sufficient for the reason that the deposition of one Deem was read in evidence at the trial of the original cause, and that the same is not made a part of the complaint in this proceeding. It is alleged, however, that said deposition is lost and cannot be found; but what is averred to be evidence of said witness is made a part of the complaint. We think, under such circumstances, it was sufficient to set out the substance of the evidence of such witness as was done in this case, and that the complaint was not insufficient for this reason.

All the evidence given at the trial of this proceeding is brought into the record by a bill of exceptions, but we have not been able to find any evidence to sustain the allegation in the complaint, that such deposition was lost and could not be found, or that the witness, Deem, testified in substance, as there alleged. It is not sufficient merely to set out the evidence given at

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the trial of the original cause and make it a part of the complaint for a new trial; but the evidence there given must be established by proper evidence at the trial of the issues joined on the complaint for a new trial.

The court erred, therefore, in overruling appellant's motion for a new trial.

Judgment reversed, with instructions to sustain the demurrer to the amended complaint.

CASTLE v. BELL ET AL.

[No. 17,737. Filed May 7, 1896.]

INTOXICATING LIQUORS.—*Application for License a Judicial Proceeding.*—The proceeding, under the act of 1875 for a license to sell intoxicating liquors, is a judicial proceeding.

SAME.—*Application for License.—Burden of Proof.*—A petitioner for a license to sell intoxicating liquors, has the burden cast upon him to prove that he is not in the habit of becoming intoxicated, and is otherwise, under the law, a fit person to be intrusted with a license to sell such liquors.

SAME.—*Remonstrance Against Application for License.—Signing by Attorney.—Statute Construed.*—Under section 7278, Burns' R. S. 1894 (section 5314, R. S. 1881), authorizing any voter of the township, wherein an applicant for a license desires to retail intoxicating liquors, to remonstrate in writing against the granting of the license, on the ground of immorality or other unfitness of such applicant, the right of such voter or voters may be exercised through the agency of a duly authorized attorney; and a motion to strike out a remonstrance, because signed by such attorney, was properly overruled.

ATTORNEY AT LAW.—*Appearance.—Prima facie Evidence.*—The appearance of an attorney at law for remonstrators, against an application for license to sell intoxicating liquors, is *prima facie* evidence of his authority to so appear.

From the Fountain Circuit Court. *Affirmed.*

E. F. McCabe, for appellant.

W. L. Rabourn, for appellees.

145	8
145	494
145	8
155	656
156	15
156	16
4156	19
145	8
158	590
158	591
145	8
167	440
145	8
169	516
145	8
171	61
171	185

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JORDAN, J.—The appellant applied to the board of commissioners of the county of Warren, at its December session, 1894, for a license to sell intoxicating liquors, in a less quantity than a quart. The board, upon a hearing, refused to grant the license, and an appeal was taken by the appellant to the Warren Circuit Court, from which a change of venue was granted to the Fountain Circuit Court, wherein, upon a trial by the court, a license was again denied the appellant and judgment rendered against him for cost. Before the board of commissioners, a written remonstrance was filed, objecting to the issuing of a license to the appellant upon the grounds that he was in the habit of becoming intoxicated, and of other unfitness therein specified. In this remonstrance it was alleged, that the remonstrators were voters of the township wherein the appellant was intending to sell the intoxicating liquors, and the names of George Bell and some eleven other persons were signed to the remonstrance. After the names of these remonstrators, were the words: "By William L. Rabourn, attorney for remonstrators." Appellant unsuccessfully moved, both before the commissioners and in the circuit court, to strike out this remonstrance upon the ground that it disclosed upon its face, that the names of the remonstrators were signed by attorney. The overruling of this motion is the error assigned.

Counsel for appellant insist, that under the law, the names of the remonstrators were required to be affixed in person or by some one especially directed to do so by the person remonstrating, and not by some one acting under the limited authority of an attorney at law. It has been held by this court that the proceeding for a license to sell intoxicating liquors, under the statute, is a judicial proceeding. *Halloran v. McCullough*, 68 Ind. 179; *List v. Padgett*, 96 Ind. 126.

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When a person becomes a petitioner for a license to sell intoxicating liquors, under the act of 1875, the burden is cast upon him to prove, both before the commissioners and in the circuit court, in the event of an appeal, that he is not in the habit of becoming intoxicated, and is otherwise, under the law, a fit person to be intrusted with a license to sell such liquors. *Goodwin v. Smith*, 72 Ind. 113; *List v. Padgett*, *supra*.

This *onus* rests upon the applicant, and such proof is required of him before he can obtain a license, without regard to the fact that a remonstrance as to his unfitness has or has not been interposed to the granting thereof.

Of course, it must be understood that if upon the hearing of the application, the remonstrators seek to establish the grounds of unfitness, as charged in their remonstrance, the burden, in this respect, is upon them to do so by a preponderance of evidence. Where evidence upon the point of the applicant's fitness is introduced *pro* and *con*, the question then to be determined upon a consideration of all the evidence given in the cause is, does the same preponderate in favor of his fitness to be intrusted with the license in question? If it does, the law awards it to him, otherwise his request therefor should be denied.

Under section 7278, R. S. 1894 (section 5314, R. S. 1881), it is the privilege of any voter of the township, wherein the applicant desires to retail intoxicating liquors, to remonstrate in writing, against the granting of the license to him, on account of his immorality or other unfitness. Upon a reasonable interpretation of this provision of the statute, it is manifest that its purpose was to authorize a voter, by a remonstrance in writing, duly filed before the board of commissioners, to make himself an adverse party to the petitioner in the proceedings instituted by the latter to ob-

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tain a license. The remonstrator is thereby given a standing in court in like manner as any other adverse party in an action, and entitled, upon the hearing of the cause, under the charges in his remonstrance, to expose by competent evidence the unfitness of the applicant to be intrusted with the license which he seeks to obtain, and to resist the granting thereof, by interposing all legitimate and proper objections to the proceeding. See *Miller v. Wade*, 58 Ind. 91; *Ex parte Miller*, 98 Ind. 451. Having this right to remonstrate for cause under the statute, and to oppose the application, we are of the opinion, that it may be exercised through the agency of a duly authorized attorney. In fact, it may be said that a proceeding instituted to obtain a license to retail liquors, under the act of 1875, is in its nature a civil action, within the meaning of section 973, R. S. 1894 (section 961, R. S. 1881), which provides that a civil action may be prosecuted or defended by a party in person or by attorney. In the case at bar the appearance by Rabourn, as attorney for the remonstrators, was *prima facie* evidence of his authority to appear for them. Weeks Attorneys, section 326. His authority to sign the names of the appellees to the remonstrance and to appear for them, as their attorney, might have been, at the proper time, called in question by the appellant, and proof of this, warrant for so doing required. Section 970, R. S. 1881 (section 982, R. S. 1894); *Indiana, etc., R. W. Co. v. Maddy*, 103 Ind. 200. The court did not err in overruling the motion to reject the remonstrance.

Judgment affirmed.

MCCABE, J., was absent.

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[No. 17,840. Filed May 7, 1896.]

CRIMINAL PROCEDURE.—*Assault and Battery with Intent to Kill.—Affidavit and Information.*—A charge of shooting and also of wounding, alleged to have been done unlawfully, feloniously, and purposely, and with premeditated malice, is sufficient to charge present ability on the part of the accused, to carry his felonious intent into effect.

CRIMINAL LAW.—*Assault and Battery with Intent.—Evidence.—Previous Good Character.—Mitigation of Punishment.*—In a prosecution for assault and battery with intent to kill, where the facts proved, clearly show an attempt to kill, evidence of previous good character will not avail to negative the intent, but may avail in mitigating the punishment.

TRIAL.—*Criminal Procedure.—Instruction to Jury.*—An instruction, that the jury “should not go beyond the evidence, or a want of evidence to hunt for doubts,” is not objectionable, when construed with other instructions, that the jury “should not entertain such doubts as are merely chimerical, whimsical, or based on groundless conjecture.”

APPELLATE PROCEDURE.—*Instructions to Jury too General, when not Ground for Reversal.*—The fact that instructions were too general, is not ground for reversal if more particular instructions were not requested.

INSTRUCTIONS TO JURY.—*Assault and Battery.—Intent.*—An intent to kill may be inferred, from an assault and battery with a deadly weapon used in such a manner as to be reasonably calculated to destroy life.

SAME.—*Self-defense.*—An instruction to the effect that the defendant might lawfully act upon his own belief of danger to himself, at the time of the shooting, is a sufficient statement of defendant's rights.

TRIAL.—*Challenge of Juror.—Harmless Error.*—Where a juror was challenged, for the reason that he had before the trial formed an opinion as to the merits of the case, and the objection was overruled by the court, and the juror peremptorily excused, and the appellant had not exhausted his peremptory challenges when the jury was made up, the error, if any, was harmless.

SAME.—*Oral Instructions.—Objections Waived.*—An agreement that certain papers and certain sections of the statutes might be read, and

145 12
148 704
145 12
168 378

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certain other remarks made orally to the jury, as a part of the instructions, constitute a waiver of the requirement that the instructions must be in writing.

From the Huntington Circuit Court. *Affirmed.*

Spencer & Branyan, for appellant.

W. A. Ketcham, Attorney-General, *E. C. Kelsey*, and *Hart & Hart*, for State.

HOWARD, J.—The affidavit and information in this case charged: "That on the 7th day of June, A. D. 1895, Jacob Voght, at and in said county and State, aforesaid, did then and there unlawfully and feloniously commit a violent injury upon the person of Charles Christman, by then and there unlawfully, feloniously, and purposely, and with premeditated malice, shooting and wounding the said Charles Christman, with a pistol, then and there loaded with gunpowder and leaden ball, which the said Jacob Voght then and there had and held in his hands, with the intent then and there and thereby, him, the said Charles Christman, unlawfully, feloniously, purposely, and with premeditated malice, to kill and murder."

Complaint is first made that the court overruled appellant's motion to quash the affidavit and information. It is said that the information is not good as a charge of assault with intent, for the reason that it does not charge present ability. It is enough to say, in answer to this contention, that the information is not a charge of assault with intent, but of assault and battery with intent; the appellant is charged with "shooting and wounding." That was an assault and battery, and not a simple assault. "Shooting a person," as said in *Jarrell v. State*, 58 Ind. 293, "means that the person was hit by the substance with which the gun or pistol was loaded." In the case before us,

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not only was "shooting" charged, but also "wounding;" and the shooting and wounding were alleged to have been done "unlawfully, feloniously, and purposely, and with premeditated malice." We are inclined to think the battery was fully charged, although not in the precise words of the statute. It was substantially correct. Section 1806, R. S. 1894 (section 1737, R. S. 1881); *Sloan v. State*, 42 Ind. 570; *State v. Prather*, 54 Ind. 63; *Hays v. State*, 77 Ind. 450; *Knight v. State*, 84 Ind. 73; *Chandler v. State*, 141 Ind. 106.

The allegation was quite sufficient to charge present ability on the part of the appellant to carry his felonious intent into effect; namely, that he shot and wounded Christman with the intent to kill him. *Kunkle v. State*, 32 Ind. 220.

In *Littell v. State*, 133 Ind. 577, relied upon by appellant, there is nothing in conflict with our conclusion in holding the affidavit and information in the case at bar sufficient. In that case the indictment was held by the court to be insufficient, by reason of its extreme obscurity and awkwardness of construction. Here there is no uncertainty in the affidavit and information.

The only other alleged error discussed by counsel is the overruling of appellant's motion for a new trial.

There is but little conflict in the evidence; and, taking that which sustains the verdict, it appears that on the evening of June 7, 1895, the "band boys" of the village of Bippus, in Huntington county, gave a social dance. Among those who attended were the appellant and his two brothers. The appellant carried a revolver, and all three carried "slung shots;" and all were engaged in various quarrels during the evening. The prosecuting witness, Christman, kept a saloon near the dance hall; and appellant and his brothers,

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with several others, were, at different times, drinking in the saloon. Christman, having heard that one of the brothers, Emanuel, was under age, on one of the occasions, refused him beer. Emanuel, at this became angry and started behind the bar to get the beer himself, when Christman picked up his "billet," a hickory club about twelve inches long, and ordered him back. At this the appellant came forward, saying that whoever struck his brother "would take what he got," at the same time putting his hand to his hip. Emanuel had struck the bar with his "slung shot," or "billet," during the quarrel, and when appellant reached his hand to his hip, Christman thought he was also reaching for his "billet," or other weapon. On the closing of the saloon, a few minutes before 11 o'clock, appellant and his brother went out on the street and Christman went to the dance to act as door-keeper. Emanuel Voght had a quarrel, earlier in the evening, in the dance hall. Appellant claimed that on this occasion, and in the quarrels in the saloon, as well as in the several street brawls, he acted the part of peace-maker, and tried to make his brothers behave themselves. Christman saw the fighting in the street as he came from his saloon to the dance hall. When he took charge of the door, he locked it, opening it to those who asked to go in or out. A short time after Christman took charge of the door, appellant and his brother Emanuel, being chased by the street crowd, ran up the stairway to the hall. One of them, Emanuel, it would seem, finding the door closed, threw himself against it and burst in the upper panel. Immediately Christman opened the door and appellant walked in, in great anger, and turned towards Christman with raised hand, and, using a vile epithet, asked him if he had locked the door. Christman replied that he had, and pushed appellant off, and fol-

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lowed him up with a stroke of his fist. Appellant then put his hand to his hip, as in the saloon, and Christman, noticing this, took his "billet" from his breast, where he carried it, and was about to use it on appellant, when appellant, who had partly fallen from Christman's second stroke, shot Christman through the breast.

Counsel for appellant contend that the evidence does not show a felonious intent. We are inclined to think that it does. Many facts, detailed in the voluminous record, tend to show that appellant and his brothers were bent on mischief during the whole evening, in the saloon, in the street, and in the dancing hall. Appellant, who lived nine miles distant, gave as a reason for taking his revolver along, that he intended to have "a time." His threat in the saloon and his assault upon Christman at the hall door indicated not only anger, but also malice; and his admissions to the sheriff after his arrest have the same indication. Counsel think that the evidence given of his previous good character, should negative any intent to do violence to the prosecuting witness. We confess that this evidence is not such as to impress us very forcibly. His character witnesses were chiefly persons in whose employment appellant had been some years previous, and their knowledge was not of his general reputation, but rather of their own personal relations with him. But however strong this evidence might have been, it could not affect the positive testimony of appellant's misconduct on this occasion. Evidence of good reputation is all powerful, in case of uncertainty as to the force of evidence in relation to the crime charged, or where the evidence adduced to prove the charge is altogether circumstantial. In this case the facts and incidents in relation to the appellant's conduct were clearly established. The jury

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were of opinion that his acts showed an attempt to kill Christman, when he shot him; and his previous good character could not avail to change those acts, however much it might avail in mitigating his punishment. *Rollins v. State*, 62 Ind. 46; *Cavender v. State*, 126 Ind. 47.

In *Kunkle v. State*, already cited, it was said that, "If the assault and battery is perpetrated with a deadly weapon, used in such a manner as to be reasonably calculated to destroy life, the intent to kill may be inferred, as a fact, from the act itself, upon the principle that every man is presumed to intend the natural, necessary, and even probable consequences of an act which he intentionally performs." And in *Smith v. State*, 142 Ind. 288, it was held, that in the absence of exceptional circumstances a person is not justified in repelling a blow with the fist, by drawing a deadly weapon on his assailant.

Counsel complain because the sixth instruction given the jury contains the clause, "You should not go beyond the evidence or a want of evidence to hunt for doubts." We are of opinion that these words could not be understood by the jury in the sense suggested by counsel. The court evidently intended to inform the jury that a reasonable doubt might arise, either from the evidence given or from a lack of evidence; but, as said further on in the instruction, that the jury "should not entertain such doubts as are merely chimerical, whimsical, or based on groundless conjecture." In the instruction immediately preceding, the jury were told that, "The reasonable doubt which exists and entitles the accused to an acquittal, is a doubt of guilt reasonably arising from all the evidence in the case, or from a want of evidence." This

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was in harmony with *Densmore v. State*, 67 Ind. 306, cited by appellant.

Appellant next complains of instructions nine and eleven, on the law of self-defense; and instruction twelve, on the law of conspiracy. These are all general instructions, and as such are not, as we think, objectionable. There was evidence, both as to self-defense and as to conspiracy, to which the instructions were in some degree applicable; and if more particular instructions should have been given on those subjects, counsel should have offered them.

Instruction number two, asked by the State, was proper as charging the jury as to what acts would be sufficient, from which an intent to kill might be inferred. The information itself charged an assault and battery; namely, shooting and wounding, with an intent to kill; and the instruction charged, that if an assault and battery was perpetrated with a deadly weapon, used in such a manner as to be reasonably calculated to destroy life, the intent to kill might be inferred. This is strictly the law. *Kunkle v. State, supra*; *Newport v. State*, 140 Ind. 299. It was for the jury to determine whether such an assault and battery had been committed.

Neither do we see how the appellant could suffer harm from the fourth instruction, asked by the State. The jury could judge only from the evidence adduced, or from a failure of evidence; and if they were of opinion, from all the evidence in the case, that appellant was not in danger of bodily harm, at the time he shot Christman, and that he had no reason to believe himself in such danger, and did not, in fact, believe himself in such danger, then the law would imply that his act was done with an evil purpose. The instruction does not say that the appellant might not act upon appearances, as they presented themselves to

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his mind at the time. On the contrary, the jury are plainly given to understand, that the appellant might lawfully act upon his own belief of danger to himself at the time of the shooting. The charge was, substantially, that if the appellant believed himself in great bodily danger, he might do what he thought reasonably necessary for his own defense.

Fault is found with other instructions given, but we think that none of the instructions given were seriously objectionable.

The juror, Ezra F. Williams, was objected to as incompetent, for the reason that he had, before the trial, formed an opinion as to the merits of the case, and which it would take some evidence to remove. Whether the objection should have been sustained, we need not determine; but as the juror was excused peremptorily, and as the appellant had not exhausted his peremptory challenges, when the jury was made up, we are of opinion that he did not suffer any harm from the ruling of the court. Section 1825, R. S. 1894 cl. 10 (section 1756, R. S. 1881, cl. 10); *Siberry v. State* 146 Ind. —, 39 N. E. Rep. 936.

Error is charged in the giving of a part of the instructions orally, when a request had been made that all the instructions should be in writing. This would have been cause for reversal, *Littell v. State, supra*; *Sellers v. City of Greencastle*, 134 Ind. 645; but we are of opinion that in this case the agreement of the appellant, made in open court, that certain papers and certain sections of the statutes might be read, and certain other remarks might be made orally to the jury as a part of the instructions, cured the error here complained of. While, in case proper request is made, all the instructions should be made in writing, for the very good reason that all may go with equal authority to the jury; yet we do not think this is such a right as

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might not be expressly waived by a defendant in open court. Neither was any exception taken, at the time, to the action of the court in giving a part of the instructions orally. *Bruce v. State*, 87 Ind. 450; *Colee v. State*, 75 Ind. 511.

In *Brown v. State*, 105 Ind. 385, the following comments, as made by Judge Mitchell, are quite applicable to the case at bar, with the sole exception that here the defendant is not charged with murder, but with an attempt to commit murder:

"A careful consideration of the evidence leaves no room for doubt in our minds, that, notwithstanding the court may have in some degree erred in the statement of merely abstract propositions of law, the jury were, taking the instructions as a whole, correctly charged in respect to the law applicable to the facts in the case. The conclusion was inevitable, upon any justifiable theory of the evidence, that the jury must have found the defendant guilty of murder in one or the other degree.

"The statute wisely provides in respect to appeals in criminal cases, that, 'In the consideration of the questions which are present, upon an appeal, the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant.' Section 1964, R. S. 1894 (section 1891, R. S. 1881).

"Considering all the instructions given, it appears that the jury were, in respect to all that was material to enable them to arrive at a correct result, properly instructed. However much we may regret the giving of instructions which are subject to criticism, we can not, in view of the statute, reverse the judgment for the errors which may have intervened, on account of

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inaccuracies or merely abstract misstatements of law found in some of the instructions. *Epps v. State*, 102 Ind. 539."

In the case at bar, the foregoing observations may also be extended to actions and rulings of the court complained of, other than instructions given. The conclusion, however, was inevitable, upon any justifiable theory of the evidence. The jury must have found the defendant guilty; and the punishment, four years' imprisonment, was most merciful, indicating, without doubt, that the jury took account of all considerations urged in excuse of appellant's act.

Judgment affirmed.

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[No. 17,472. Filed May 8, 1896.]

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147	536
145	21
162	490

DEDICATION.—*Park.*—*Municipal Corporation.*—An irrevocable dedication of land is effected by designating certain land on a map filed in the county recorder's office as a "park," and by selling lots with reference to the map.

SAME.—*Parol Evidence.*—Where a dedication of a tract of land is express, evidenced by a recorded plat, the intent, as expressed by such plat, cannot be contradicted by parol evidence.

SAME.—*Irrevocable After Private Rights have Accrued.*—A dedication of land to public use is not revocable after private rights have accrued by reason thereof.

SAME.—*Municipal Corporation Trustee for Public.*—*Change of Trustees.*—Where there has been laid out and filed a plat of land as an addition to a city, upon which plat a portion of the land is designated as a park, and there has been a sale of lots in reference to the plat, the dedication of the "park" thus effected is to the public, and may be asserted by a town subsequently incorporated, which annexes such addition to its corporate limits, for a change of trustees does not defeat the dedication.

ESTOPPEL.—*Dedication.*—*Unauthorized Taxation.*—*Municipal Corporation.*—A municipal corporation is not estopped to assert a dedication of land, by the unauthorized taxation thereof to the original owner, after dedication.

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From the Marion Circuit Court. *Affirmed.*

J. C. Green, and Lamb & Hill, for appellant.

Kealing & Hugg, for appellee.

HOWARD, J.—This was an action, brought by the appellant to quiet his title to a certain square of ground, situated within the corporate limits of the appellee town of Brightwood.

There were two trials of the cause. The first trial, before the regular judge of the court, resulted in a finding and judgment in favor of the appellee. On a new trial, granted as a matter of right, under the statute, the cause was tried by the special judge below, and also resulted in a finding and judgment for the appellee.

The questions arising on this appeal require a decision as to the correctness of the court's action in overruling the appellant's motion for a new trial.

It appears, from the evidence, that on the 19th of October, 1872, Sheldon Morris and Bennett F. Morris filed in the office of the recorder of Marion county a plat of their Oak Hill addition to the city of Indianapolis, subdividing a fifty-acre tract into one hundred and seventy-four lots and two blocks. One of the blocks was designated "A," and the other was named "Morris Park." The latter contained about three acres, and is the land in controversy. It does not appear that the city of Indianapolis ever accepted the proposed addition or extended its jurisdiction over the platted territory.

On April 11, 1876, the town of Brightwood was incorporated; and on January 15, 1880, the town annexed the said Oak Hill addition to its corporate limits, the plat lying adjacent both to the city of Indianapolis and to the town of Brightwood.

In 1876, Morris Park was enclosed with a fence by

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Sheldon Morris, and used by him as a pasture. On May 16, 1878, Bennett F. Morris conveyed his interest in Morris Park to Sheldon Morris, and the appellant claims title through *mesne* conveyances from Sheldon Morris.

The appellant contends that these facts do not show any dedication of Morris Park to the public, or, if there was such dedication, that it was never accepted by the public until after the donors had revoked the dedication and resumed dominion over the property.

The appellee, on the other hand, contends that the filing of the Oak Hill plat in the recorder's office was an express dedication to the public of the streets, alleys, and public grounds thereon designated, including Morris Park; and that while a person might call his property a park, and such naming of it would not constitute a dedication, yet, when he subdivides the property and places his plat of record, marking parts of it as streets and alleys, and one part of it as a park, and then sells lots with reference to this plat, that the rights of both the public and the purchasers of lots intervene, and thereafter the dedication is irrevocable.

We are of opinion that the contention of the appellee is the law, and must prevail.

In Dillon Munic. Corp. (4th ed.), section 644, it is said that, "The doctrine of dedication to public uses has also been extended and applied to *public squares* in cities and villages, these being regarded as easements for the benefit of the public; and the fact of dedication may be established in the same manner as in the case of highways and streets."

And in section 645, the author says: "Where the words '*public square*' are used on a plat, that is an unrestricted dedication to public use."

Numerous authorities are cited in the notes to the propositions, among them, *Doe v. Town of Attica*, 7 Ind.

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641; *Commonwealth v. Rush*, 14 Pa. St. 186, and *Abbott v. Cottage City*, 143 Mass. 521, where the cases are collected. In these, and other cases cited, it is held that dedication is shown by spaces on plats designated by the words park, public square, public ground, common, county block, college square, plaza, place, etc.

"Whenever a public square or common," it is said in *Abbott v. Mills*, 3 Vt. 521, 526, "is marked out or set apart as such by the owners or proprietors, and individuals are induced to purchase lots or lands bordering thereon, in the expectation held out by the proprietors or owners that it should so remain, or even if there are no such marks placed on the ground, but a map or plan is made, and village lots marked thereon, and sold, as such, it is not competent for the proprietors or owners to disappoint the expectations of the purchasers by resuming the lands thus set apart, and appropriating them to any other use."

Mr. Dillon adds: "The word 'park' written upon a block upon a map of city property indicates a public use; and conveyances made by the owners of the platted land, by reference to such map, operate conclusively as a dedication of the block." Citing *Price v. Plainfield*, 40 N. J. L. 608; *Maywood Co. v. Maywood*, 118 Ill. 61.

Even where dedications by maps and plats are so made as to render it difficult to determine their nature and extent, it is a safe general rule, as said in *Elliott Roads and Sts.*, p. 111, "to resolve doubts in such case against the donor, and, within reasonable limits, to construe the dedication so as to benefit the public rather than the donor. Naturally, the presumption is, that one who records a plat, and marks upon it spaces that appear to form no part of any of the platted lots, dedicates the land represented by the spaces thus ex-

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cluded to a public use." See also *City of Indianapolis v. Kingsbury*, 101 Ind. 200; *Miller v. City of Indianapolis*, 123 Ind. 196.

And in *Doe v. Town of Attica*, cited above, it was held by this court that, even though the recorded plat did not show any words of dedication, yet where the proprietor, after the recording of his plat, went about exhibiting to the citizens of the town a plat on which certain lots were marked "public square," the map so exhibited was evidence of dedication.

In the case at bar, not only was there an express dedication of Morris Park upon the recorded plat, but evidence was given to show that lots were sold with reference to this plat, the park being specifically pointed out to the purchasers at the time, and prices being fixed upon the lots in proportion to their nearness to the park.

Even if there had been no express dedication of the park, we are of opinion that this conduct of the proprietors, in making sale of their lots on the faith of the proximity of a public park, would constitute an implied dedication. Dill. Munic. Corp. (4th ed.), section 640; Elliott Roads and Sts., 112.

It was said in *Miller v. City of Indianapolis, supra*: "Marking a street upon a plat of an addition to a town or city, and selling lots with reference thereto, constitutes a dedication. *Faust v. City of Huntington*, 91 Ind. 493; *City of Evansville v. Page*, 23 Ind. 525; *City of Logansport v. Dunn*, 8 Ind. 378; *City of Indianapolis v. Kingsbury, supra*. As to whether a plat contains an express dedication of a strip of ground to the public, as a street, is a matter of law for the court. *Hanson v. Eastman*, 21 Minn. 509; *Yates v. Judd*, 18 Wis. 126; *Sanborn v. Railway Co.*, 16 Wis. 20. In *City of Indianapolis v. Kingsbury, supra*, it was said by this court: 'But the inten-

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tion to which courts give heed is not an intention hidden in the mind of the land-owner, but an intention manifested by his acts. It is the intention which finds expression in conduct, and not that which is secreted in the heart of the owner that the law regards. Acts indicate the intention; and upon the intention, clearly expressed by open acts and visible conduct, the public and individual citizens may act. * * * The question whether a person intends to make a dedication of ground to the public for a street or other purpose must be determined from his acts and statements explanatory thereof, in connection with all the circumstances that surround and throw light upon the subject, and not from what he may subsequently testify as to his real intention in relation to the matter.' *City of Columbus v. Dahn*, 36 Ind. 330; *Lamar Co. v. Clements*, 49 Tex. 347; *City of Denver v. Clements*, 3 Col. 484. An implied dedication may be rebutted by parol testimony; but where the dedication is expressed, evidenced by a recorded plat, the intent, as expressed in such plat, cannot be contradicted by parol. *City of Indianapolis v. Kingsbury*, *supra*, and authorities there cited."

The foregoing reasoning of Judge Coffey, fortified as it is by the numerous authorities of this and other States there cited, seems conclusive as to almost every contention, made by counsel for appellant, in the case at bar.

As to what conduct on the part of the proprietor will constitute an implied dedication of land for public purposes, see further, *Elliott Roads and Sts.*, 132; *Dillon Munic. Corp.* (4th ed.), section 636; *City of Columbus v. Dahn*, *supra*; *Lake Erie, etc., R. R. Co. v. Town of Boswell*, 137 Ind. 336, at 342.

The cases relied upon by appellant are not, as we

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think, in conflict with the conclusions which we have reached in this case.

In *Westfall v. Hunt*, 8 Ind. 174, it appeared that the proprietor of the town of Thorntown, being desirous of having the county seat of Boone county located in that town, marked a public square on the plat for the county buildings. The commissioners, however, chose Lebanon as the county seat; and it was held that the square having been dedicated for a purpose that was not accepted by those in whose interest it was made, the land reverted to the donor. There was no evidence that the land was dedicated to the public generally, but only for the specific purpose indicated. It has always been the law, that no dedication can be complete without an acceptance by those in whose favor the dedication is made. A dedication is, in some sense, a contract; and the public, or others interested, cannot be compelled to accept a dedication merely because it is made in their favor. *Elliott Roads and Sts.*, 113. However, in case private rights accrue by reason of the dedication there can be no revocation. *Dillon Munic. Corp.*, section 632. As to acceptance of dedication, see further, *Mansur v. State*, 60 Ind. 357; *City of Chicago v. Drexel*, 141 Ill. 89.

The case of *City of Logansport v. Dunn*, *supra*, also relied upon by appellant, is, as we think, an authority against his contention. It was held in that case that the laying out of an addition to a city by the owner of adjacent lands; the recording of a plat thereof, and the sale of lots with reference to such plat, operate as a dedication to public use, of all streets, alleys, and other grounds, clearly designed to be so appropriated. Also, that the designation upon such plat, of a lot or space, as a site for a church, seminary, market, or common, operates as a dedication of the same to the public, for such purpose.

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It is true, that in that case the court said that, "whether by inserting the words 'Spencer square' in an open space on the map of the town, the proprietor intended to dedicate the ground to public use, was a question of fact to be found by the jury." But even if this were a correct statement of the law, the case can not be authority in favor of the appellant. The court there added: "The evidence on this point was conflicting, and was obviously of such a character that an appellate court would not be authorized to disturb their verdict, which ever way it might have been." In the case at bar, the trial court, on the evidence submitted, found that, by inserting the words "Morris Park" in an open space on the recorded plat, the proprietors did intend to dedicate the ground to the public use; and, by the authority cited, we are therefore not authorized to disturb that finding.

In *Scantlin v. Garvin*, 46 Ind. 262, the remaining authority relied upon by appellant, it appeared that the original town plat of Evansville contained a statement, written at the foot of the plat, to the effect that a certain part of the platted land was "reserved for a public square." Afterwards, the county commissioners accepted a proposition to locate the county seat of Vanderburgh county at Evansville and to erect the county buildings upon the said public square. Subsequently, in pursuance of the agreement by which the public square was taken for the county seat, the proprietors, by a deed absolute, and without any conditions, deeded to the county agent, "to and for the sole use, behoof and benefit of the said county of Vanderburgh," that part of the square in controversy in that case, together with a large number of other lots in the town. The court held that the county received an absolute title in fee-simple to the land in dispute, and that the words, "reserved for a public

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square," written at the bottom of the plat, indicated not a dedication, but a reservation. The purpose for which the square was reserved was accomplished by the establishment of the county seat upon the grounds; and the subsequent conveyance of the full title of a part of the property gave to the county unconditional right to dispose of the land or use it in such manner as might be for the "behoof and benefit of the said county." There can be no question that the title of the county to the land so conveyed became perfect, and the county might therefore dispose of the property as it deemed best. *Newpoint Lodge v. School Town of Newpoint*, 138 Ind. 141.

In the early organization of counties and the location of county seats, the words "public square" had a special reference to the location of the court house and other county buildings. This meaning was attached to those words in the case last cited, as well as in the case of *Westfall v. Hunt*, *supra*, and the court simply held that the dedication was limited to the purposes for which it was made.

In the case at bar, the ground in question is designated as a "park." That word has a definite and well recognized meaning, that is, a pleasure ground for the recreation and enjoyment of the people of the city or town in which the park is situated. The interests of the public in such pleasure ground are just as real as their rights to the use of the streets and alleys of the city or town. The cases cited are not in point.

As to the contention that the appellee town is estopped from claiming that the park is public property, for the reason that the tax officials assessed and collected the taxes and street assessments thereon, it may be said that the record shows that from the year 1872, when the plat was recorded, until the year 1878, the park was not placed upon the tax duplicate, al-

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though during that period the remaining lots of the addition owned by the proprietors were regularly assessed. This is rather an indication that all parties concerned understood at, and for years after the time of the recording of the plat, that the land was dedicated to the public for a park, as shown on the plat. Indeed, the failure of the public authorities to place the park lands upon the tax duplicate, may be regarded as evidence of express acceptance by the public of the dedication of the park. The fact that the ground was afterwards placed upon the duplicate by the county treasurer, and taxes and assessments collected against it, could not deprive the public, or those who had purchased lots with reference to the plat on which the park was shown, of rights which they had previously acquired by reason of the dedication. The authorities are to the effect that such unauthorized taxation of public property has no effect on the status of the property, or upon the rights of the public or of individuals in relation to it.

In *Town of San Leandro v. Le Breton*, 72 Cal. 170, a similar contention was made as to taxes and street assessments levied upon property which had been dedicated to the public, and the court said: "That when the block was dedicated to the use of the public as a public square it became a part of the public grounds of the town, and could not be legally assessed or taxed for State, county, or municipal purposes; and the erroneous action of officials in the respects named could not impair the rights of the public, or confer rights upon the defendants. The doctrine of estoppel has therefore no application." To the same effect see *Ellsworth v. City of Grand Rapids*, 27 Mich 250; *Getchell v. Benedict*, 57 Ia. 121.

Of course, nothing here said is to be taken as holding that a dedication of public grounds may be made

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against the consent of the public. To make the dedication complete there must always be an acceptance, express or implied. The facts in this case show, if not an express, at least an implied acceptance by the public.

Another contention made by counsel is that the addition in which Morris Park is situated was made to the city of Indianapolis, and not to the town of Brightwood, and that the town has, therefore, no claim upon the ground so dedicated. Counsel forget that the dedication was made for the use of the public, and particularly the property-owners and residents in the addition itself. The appellee town is but a trustee for the public. Any individual having a particular interest in the park might have taken the proper steps to maintain the dedication if the town, as trustee, had failed to do so. *Fossion v. Landry*, 123 Ind. 136; *Le-Clercq v. City of Gallipolis*, 7 Ohio 218; *Trustees of Watertown v. Cowen*, N. Y. Ch. 4 Paige 510; *Price v. Plainfield*, *supra*.

In Elliott Roads and Sts., 88, the author says: "A dedication, either statutory or common law, to a public corporation is not lost by changes in the form of the corporate government, nor by changes in its territorial boundaries. * * * Towns, townships, and cities are but trustees of the public, and, as in cases of ordinary trusts, the public trust is not defeated by a change of trustees. Public corporations of the classes mentioned are governmental subdivisions, and changes in their forms, powers, and obligations do not deprive the public of their rights in public easements, nor in public property, such as schoolhouses, public squares and the like." See also pp. 108 and 118 of the same work.

Complaint is also made of the exclusion of certain evidence; chiefly that offered to show the intention of

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the proprietor as to the dedication. We think, however, that what we have already said, particularly what is cited from *Miller v. City of Indianapolis, supra*, covers this question. Some minor questions, also, discussed by counsel, are, we think, fully covered by what we have said and by the authorities cited.

Other authorities sustaining the views which we have maintained in this case are: *Archer v. Salinas City*, 93 Cal. 43 (16 L. R. A. 145); *Trustees M. E. Church v. Hoboken*, 33 N. J. L. 13; *Huber v. Gazley*, 18 Ohio 18; *Hoadley v. City of San Francisco*, 124 U. S. 639; *Town of Marion v. Skillman*, 127 Ind. 130; *President, etc., v. White*, 31 U. S. (6 Peters) 431; *Shea v. City of Ottumwa*, 67 Ia. 39.

Judgment affirmed.

O'NEAL v. HINES.

[No. 17,750. Filed May 8, 1896.]

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164 147
164 553
166 541
166 544

PLEADING.—Complaint.—Sufficiency Of.—Breach of Contract.—A complaint alleging that plaintiff and defendant had been partners in business; that defendant for a certain consideration offered to surrender his interest in the firm to plaintiff, and not to engage in the business in the town so long as plaintiff continued in the business in said town; and for these considerations consummated the trade and fully complied with the agreement, sufficiently alleges a contract on defendant's part not to engage in such business.

CONTRACT.—Restraint of Trade.—Indefiniteness Of.—A contract not to engage in a certain business within a prescribed territory "so long as plaintiff remained in said business in said city," is not invalid because the restraint is indefinite as to time.

SAME.—Restraint of Trade.—Statute of Frauds.—An agreement not to engage in a rival business in a certain locality, so long as the other party remains in such business, is not within the statute of frauds.

SAME.—Restraint of Trade.—Construction Of.—In the sale by one partner of his interest in the partnership business to the other part-

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ner, an agreement on the part of the former not to engage in a rival business in the locality, so long as the other remains in such business, as part of the consideration of the sale, is not invalid as unreasonable.

SAME.—*Restraint of Trade.—Injunction Restraining Breach Of.*—

When one has made a valid contract with another that he will not engage in a certain business or occupation, and it is shown by the other party to the contract that the same is being violated to his injury, he is entitled to an injunction restraining the offending party, notwithstanding the offending party was at the time solvent.

PRACTICE.—*Harmless Error.—Special Finding.*—The erroneous overruling of a demurrer to a paragraph of the complaint is harmless, where the special finding follows and sustains the allegation of another paragraph, which is sufficient.

SPECIAL FINDINGS.—*Signature of Judge.—Sufficiency of Signing.*—

The signature of the judge following the conclusions of law, is a sufficient signing of a special finding of facts, which precedes the conclusion of law.

From the Adams Circuit Court. *Affirmed.*

R. H. Hartford, for appellant.

T. Bosworth and O. H. Adair, for appellee.

MONKS, J.—Appellee brought this action to enjoin appellant from engaging and continuing in the undertaking business in the city of Portland, Indiana. The complaint was in two paragraphs, to each of which a demurrer for want of facts was overruled. An answer of general denial was filed, the cause tried by the court, and at request of appellant, a special finding of the facts made and conclusions of law stated thereon; to each of which conclusions of law appellant at the time excepted.

The court, over a motion for a *venire de novo* and a motion for a new trial, rendered judgment in favor of appellee, enjoining appellant "from engaging and continuing in the undertaking business in the city of Portland, Indiana, so long as appellee shall continue in said business in said city."

Appellant assigns errors as follows:

First. That the court erred in overruling the demurrer to the first paragraph of complaint.

Second. That the court erred in overruling the demurrer to the second paragraph of complaint.

Third. That the court erred in each of its conclusions of law.

Fourth. The court erred in overruling the motion for a *venire de novo*.

Fifth. The court erred in overruling the motion for a new trial.

One of the objections urged to the first paragraph of complaint is, that there is no averment that appellant agreed with appellee not to engage in the undertaking business in the city of Portland. It is shown by the allegations in the paragraph that such was the contract. It is alleged that appellant and appellee were partners in the undertaking business in the city of Portland, Indiana, and that appellant offered to appellee, "if he would give him \$1,500.00, and deed appellant his interest in certain real estate and pay off a mortgage of \$700.00, that appellant would surrender his interest in the firm to appellee and not go into the undertaking business again in the city of Portland so long as appellee remained in said business in said city. That upon these conditions the appellee and appellant consummated the trade and appellee fully complied with said agreement, and has ever since been engaged in said business."

When appellee accepted the offer made by appellant and paid the consideration as alleged, such offer, "not to engage in the business of undertaking in the city of Portland so long as appellee remained in said business in said city" became a contract, by which appellant was bound and for a breach of which he is liable.

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It is next urged that the contract is unreasonable and void for the reason that the term, so long as appellee remained in said business in said city, is too indefinite. The fact that the restraint is indefinite as to time does not invalidate the contract. *Eisel v. Hays*, 141 Ind. 41; *Beatty v. Coble*, 142 Ind. 329; *Martin v. Murphy*, 129 Ind. 464; *Gill v. Ferris*, 82 Mo. 156; *Cook v. Johnson*, 47 Conn. 175; 36 Am. Rep. 64; 3 Am. and Eng. Ency. of Law, 882-885; *Bowser v. Bliss*, 7 Blackf. 344; 43 Am. Dec. 93; *Beard v. Dennis*, 6 Ind. 200; 63 Am. Dec. 380.

Neither does the want of an allegation, that appellant was insolvent, render said paragraph insufficient.

It is a general rule that when one has made a valid contract with another that he will not engage in a certain business or occupation, and it is shown by the other party to the contract that the same is being violated to his injury, he is entitled to an injunction restraining the offending party.

This is upon the ground that from the nature of the case, just and adequate damages cannot be estimated for a breach of the contract. *Baker v. Pottmeyer*, 75 Ind. 451, 460, *Martin v. Murphy, supra*; 10 Am. and Eng. Ency. of Law, 945-947.

If, however, the parties to such a contract agree upon a certain sum as liquidated damages for a breach of the contract, instead of leaving that question open and uncertain, the remedy is by an action to recover such sum. *Martin v. Murphy, supra*.

It is not necessary that such contracts should be in writing. *Welz v. Rhodius*, 87 Ind. 1, and cases cited; Greenhood Public Policy, 712.

Appellant insists that the second paragraph is not sufficient for the reason, "that the agreement alleged to have been made is not a reasonable one. That the only averment concerning the extent and nature of

the agreement not to re-engage in the undertaking business is as follows: 'Defendant accepted said sum and agreed with plaintiff (appellee) as a part of the consideration of said trade that he (appellant) would not work at or engage in the undertaking business again in the city of Portland, Indiana, so long as plaintiff (appellee) remained in the business.' "

The contracts in *Martin v. Murphy*, *supra*; *Bowser v. Bliss*, *supra*, and *Beard v. Dennis*, *supra*, were the same in this respect as the one in suit, and this court in those cases decided against the contention of appellant.

In *Cook v. Johnson*, *supra*, the court said: "But there is a well settled distinction between a general restriction as to *place* and a general restriction as to *time*. The mere fact that the duration of the restriction as to time is indefinite or perpetual will not of itself avoid the contract if it is limited as to place, and is reasonable and proper in all other respects. *Hitchcock v. Coker*, 6 Ad. and El. 437, 447; *Bunn v. Guy*, 4 East 190; *Chesman v. Nainby*, 2 Str. 739; s. c. c., 2 Ld. Raym. 1456; *Wickens v. Evans*, 3 Younge and Jerv. 318; *Mallen v. May*, 11 M. & W. 653; *Hastings v. Whitley*, 2 Exch. 611; Story Sales (1st. ed.), section 493; *Pierce v. Woodward*, 6 Pick. 206; *Bowser v. Bliss*, 7 Blackf. 344."

Besides, if it were conceded that the court erred in overruling the demurrer to the second paragraph of complaint, the error was harmless for the reason that the special finding follows and sustains the allegations of the first paragraph of complaint, which is sufficient.

The complaint is not insufficient on account of the objections alleged by appellant, and we think the court did not err in overruling the demurrer to each paragraph thereof.

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What we have said concerning the complaint disposes of the questions presented concerning the conclusions of law.

It is urged by appellant that the special finding of facts is not signed by the judge, and that for this reason his motion for a *venire de novo* should have been sustained.

As shown by the record, the conclusions of law immediately follow the finding of facts, and the signature of the trial judge follows the conclusions of law.

We think that it was proper for the trial judge to sign the special findings, immediately following the conclusions of law, as was done in this case. The record contains the following entry: "Come the parties by their attorneys and the court files his special finding of facts and the conclusions of law thereon in these words, to-wit:" then follows the special finding, conclusions of law and signature of the trial judge. The finding of facts and conclusions of law in the case constitute one written instrument, signed and filed as such by the trial judge.

This court said in *Ferris v. Udell et al.*, 139 Ind. 579, on page 593: "No good reason is perceived why the signature of the judge may not follow the conclusions of law and constitute a sufficient signing by him of the special finding."

The motion for a *venire de novo* was properly overruled.

It is next claimed that the motion for a new trial should have been sustained, for the reason that the evidence given did not establish the contract as alleged. We have read the evidence and found that there is evidence sustaining every material allegation in the complaint.

But appellant insists "that the evidence of appellee shows that the agreement was that appellant was not

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to go into the undertaking business again *at any place*, so long as appellee remained in the business in the city of Portland." The bill of exceptions containing the evidence shows that appellee testified that appellant agreed with him (appellee) not to go into the undertaking business in Portland, Jay county, Ind., so long as appellee remained in said business, in said city.

There is no available error in the record.

Judgment affirmed.

WANTLAND v. THE STATE.

[No. 17,834. Filed May 8, 1896.]

INSTRUCTIONS.—*When Presumed to be Properly in Record.*—*Certificate of Clerk.*—An objection to the consideration, by the Supreme Court, of instructions given and refused, for the reason that the instructions contained in the record are the original instructions as given by the court, is not tenable, where it does not appear certainly that the instructions are not transcripts of the originals, and where the clerk certifies that they are.

SAME.—*Larceny.*—*Circumstantial Evidence.*—The defendant, in a criminal case, is entitled to an instruction upon request, that in order to convict on circumstantial evidence, the circumstances must be so strong as to exclude every other reasonable hypothesis, except that of the defendant's guilt, if such instruction is applicable to the evidence in the case.

LARCENY.—*Partnership Property.*—*Indictment.*—*Variance.*—*Statute Construed.*—Proof that stolen goods belonged to a partnership is not a fatal variance from the averment in an indictment for larceny that they belonged to a member thereof, in view of the statute, section 1822, Burns' R. S. 1894 (section 1753, R. S. 1881).

From the Monroe Circuit Court. *Reversed.*

East & Miller, for appellant.

W. A. Ketcham, Attorney-General, for State.

MCCABE, J.—The appellant was convicted of the

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charge in the indictment of stealing certain personal goods of one Thomas King, of the value of \$3.00, and sentenced to the penitentiary for one year, fined in the sum of \$1.00, disfranchised and rendered incapable of holding any office of trust or profit for a period of one year.

The court overruled his motion for a new trial, which ruling is called in question by the assignment of error.

The evidence, on behalf of the State, tending to prove the appellant's guilt, was all circumstantial, there being no direct evidence of such guilt.

The giving and refusal of certain instructions are made causes specified in the motion for a new trial. The Attorney-General, on behalf of the State, objects to the consideration of said instructions, because he contends that they are not properly in the record. The contention is that the bill of exceptions is embraced in the longhand manuscript incorporating the evidence, and that the instructions contained in the record are the original instructions as given by the court, and insists that there is no authority for so incorporating them, citing in support of such contention, *Holt v. Rockhill*, 143 Ind. 530; *McCoy v. Able*, 131 Ind. 417. But the trouble about this contention is that it does not appear, certainly, that any longhand report of the evidence is embodied in the transcript, nor does it sufficiently appear that the instructions are not transcripts of the originals, especially as the clerk certifies that they are.

One of the instructions tendered by the appellant and refused by the court, reads thus: "4th. This is a case where the State seeks a conviction on circumstantial evidence. The defendant is presumed to be innocent until the contrary is made to appear by the evidence, and in a case of this kind, in order to con-

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vict, the circumstances must be so strong as to exclude every other reasonable hypothesis, except that of the defendant's guilt."

That part of the instruction relating to and defining the rule as to circumstantial evidence was in no manner covered by any of the instructions given by the court.

The refused instruction was substantially a correct statement of the law as applicable to the evidence in the case. *Cavender v. State*, 126 Ind. 47; *Binns v. State*, 66 Ind. 428; *Stout v. State*, 90 Ind. 1; Gillett Crim. Law, section 873.

The evidence was of such a character that we can not say that the refusal of the instruction was a harmless error. The court erred in overruling the motion for a new trial.

The court also erred against the State in instructing that, if the goods stolen belonged to a partnership, of which King was a member, the proof would not be sufficient. The court probably overlooked the statute. R. S. 1894, section 1822 (R. S. 1881, section 1753).

The judgment is reversed and the cause remanded, with instructions to sustain the defendant's motion for a new trial.

 WILSON v. JOHNSON.

[No. 16,873. Filed Sept. 18, 1894. Rehearing denied May 12, 1896.]

CHANGE OF VENUE.—*Application for.*—*Diligence In Discovering Grounds For.*—An applicant for a change of venue, is not required to show diligence in discovering the grounds of such application. **SAME.**—*Failure to Assign as Cause for New Trial.*—*Waiver of Error.*—The failure to assign the ruling of the court in granting a change of venue, as a cause in a motion for a new trial, is a waiver of any error in such ruling.

145	40
146	578
147	211

145	40
149	531

145	40
163	453

145	40
166	290

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DEED.—*No Description Contained In.*—Deeds purporting to convey lands, but containing no description or designation of the lands, are invalid for uncertainty, and are not admissible in evidence in an action to establish title to real estate.

SAME.—*Insufficient Description.*—A deed of all “the remaining assets,” of a designated person, “as the same were granted and conveyed to the grantors herein,” is insufficient to convey lands not otherwise described therein.

EJECTMENT.—*The Burden Rests Upon Plaintiff to Show Title in Himself.*—A plaintiff in ejectment must recover on the strength of his own title, and if he fails to show title in himself it makes no difference whether the defendant had title or not.

INSTRUCTIONS.—*Refusal to Give Instructions.*—*Defective Record.*—The refusal to give requested instructions is not available error, where the record fails to show affirmatively that the instructions purporting to have been given by the court on its own volition, were all the instructions given in the cause.

From the Gibson Circuit Court. *Affirmed.*

W. H. De Wolf, L. C. Embree, and W. C. Johnson,
for appellant.

W. A. Cullop, C. B. Kessinger, and O. H. Cobb, for
appellee.

MCCABE, J.—Appellant sued appellee, in the Knox Circuit Court, to recover possession of the west half of the northeast quarter of section twenty-two, in township one, in said Knox county. The suit was commenced in the Knox Circuit Court, resulting in a judgment in that court in favor of appellant. That judgment was set aside and a new trial granted, as a matter of right under the statute. On the application of appellee the venue was changed to the court below, over appellant's objection and exception.

The next trial resulted in a judgment in the court below in favor of appellee, over a motion for a new trial for alleged cause.

The errors assigned call in question the order granting the change of venue and that overruling the motion for a new trial.

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The motion for the change and the affidavit in support thereof, were not filed within the time required by the rule of the Knox Circuit Court. But the affidavit stated, as an excuse for the delay, that the appellee "did not sooner discover the above ground for a change of venue."

It is insisted by the appellant that the affidavit was insufficient for its failure to state that the appellee had used diligence to discover that the alleged odium attached to his defense on account of local prejudices, and he cites in support of such contention *Witz v. Spencer*, 51 Ind. 253, and *Ringgenberg v. Hartman*, 102 Ind. 537. These cases were overruled, in so far as they require the applicant for a change of venue to show diligence in discovering the grounds of such application, in *Ogle v. Edwards, Admr.*, 133 Ind. 358, which has been followed in several cases since. *Bement v. May*, 135 Ind. 664. Besides the motion for a new trial does not specify the granting of the change as one of the causes therefor.

The failure to assign such ruling as a cause in a motion for a new trial, is a waiver of such error if any there was therein. *Caldwell v. Board, etc.*, 80 Ind. 99; *Shoemaker v. Smith*, 74 Ind. 71; *Horton v. Wilson*, 25 Ind. 316; *Bane v. Ward*, 77 Ind. 153. There was no available error in granting the change of venue.

On the last trial, appellant undertook to trace his title back to the government, and among the reasons assigned by him for a new trial, was the refusal of the trial court to allow him to read in evidence certified copies of three deeds purporting and claimed to be links in his chain of title.

The objection to the introduction of the deeds was that they did not describe the land in controversy in the suit. It is admitted, in argument by appellant, that the deeds did not describe the land. But it is

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contended that the first deed that was rejected referred to another deed, which other deed did correctly describe the land in such a manner as to make the description in the deed referred to a part of the deed offered in evidence, and that the error in rejecting such deed should work a reversal of the judgment, even though the other two offered deeds were correctly rejected.

It would be needlessly extending this opinion, to go into an examination of the ruling in rejecting the first deed, because we find, from an examination of all the evidence in connection with the last two deeds rejected, that the result of the trial must have been as it was, a finding and judgment for the appellee, even if the first rejected deed had been received in evidence. The last two deeds contain no description of any land whatever, and they contain no reference to any other document where such description may be found, and they are necessary links to make the appellant's chain of paper title good.

The description in the second rejected deed is as follows: "Have granted, bargained, sold, assigned, transferred, set over, conveyed, released, and confirmed, and by these presents, and by force and virtue of the above recited order and decree of court, and the power thereby in them vested, and of every other power and authority there, enabling in this behalf, do grant, bargain, transfer, set over, convey, and confirm, unto the said George Peabody, his heirs, executors, administrators, and assigns, all the remaining assets, so, as aforesaid, conveyed and transferred to the said trustee, as set forth in the said schedule 'V,' a copy whereof is hereto annexed, and also their right, title, and interest in and to all the other assets of the Bank of the United States, as the same were granted and conveyed to the grantors herein," etc.

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The description in the third rejected deed is substantially the same as the foregoing. There was no attempt to reform these deeds or to cure the defects therein by any sort of pleading or evidence.

It has often been held, by this and other courts, that deeds purporting to convey lands which do not describe or designate the lands, are invalid for uncertainty. *Buchanan v. Whitham*, 36 Ind. 257; *Shoemaker v. McMonigle*, 86 Ind. 421; *Devlin Deeds*, section 1010 *et seq.*

There was no error in refusing to allow the last two deeds to be read in evidence, and, as the appellant's paper title depended on them, the exclusion of the first deed was a harmless error, if error there was in such exclusion. Both parties claimed title by twenty years' adverse possession, under claim of ownership; but the appellant does not claim that either of the excluded deeds formed color of title, under which his alleged adverse possession had been continued twenty years. The claim of title by adverse possession on the part of appellant, is founded solely on the fact, as he claims the evidence establishes, that some ten or twelve years before this suit was brought, he was in possession under claim of ownership, which possession he claims was adverse, and joined to the possession of those under whom he claims was of twenty years' duration. But the appellee was in possession, at the commencement of the suit, as appellant's complaint alleges, and the evidence tended to show that such possession of appellee was under claim of ownership. Under such circumstances, it was incumbent on the appellant to show title in himself, and the burden of proof was on him to show such title and right of possession, and if he failed to show title in himself, it would make no difference whether the defendant had title or not. *Roots v. Beck*, 109 Ind. 472;

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Deputy v. Mooney, 97 Ind. 463; *Mull v. Orme*, 67 Ind. 95.

There was a conflict in the evidence as to the nature and character of plaintiff's prior possession. We, therefore, cannot disturb the verdict on the weight of the evidence.

The next error for which it is claimed that a new trial ought to have been granted, is the giving and refusal of certain instructions.

The record shows that a series of instructions in writing was, at the proper time, tendered by the appellant, and the court was asked to give them to the jury; which request the court refused, and to the refusal of the court to so give each of them, the appellant duly excepted. Some of the instructions so requested were proper expositions of the law applicable to the case, and if the substance of them had not, or was not, given by the court in the instructions given, their refusal would be material and reversible error. The record fails to show that the instructions, purporting to have been given by the court on its own volition, were all the instructions given in the cause. For aught that appears in the record, the court refused to give the instructions asked, because it had already given the substance of them in other instructions it had given. Under such a condition of the record, it has often been held that the refusal of correct instructions is not available error. *The City of New Albany v. McCulloch*, 127 Ind. 500; *Grubb v. State*, 117 Ind. 277; *Ford v. Ford*, 110 Ind. 89; *Lehman v. Hawks*, 121 Ind. 541; *Musgrave v. State*, 133 Ind. 297.

No special objection is pointed out, in appellant's brief, to the instruction given by the court of its own volition, contained in the record, though the giving of them is assigned as a reason in the motion for a new trial; nor do we see any objection to them. At

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all events, none of them are so radically wrong as to be incurable by other instructions, which may have been given. And we must presume that such other instructions were given, where the contrary is not, as here, made affirmatively to appear by the record. *Ford v. Ford, supra; Lehman v. Hawks, supra; Musgrove v. State, supra.*

We find no available error in the record, and, therefore, the judgment is affirmed.

ON PETITION FOR REHEARING.

MCCABE, J.—Two points only are made in the petition filed by the appellant for a rehearing.

The first is that we erred in holding that the two deeds offered in evidence were properly rejected by the circuit court, on the ground that they described no land whatever; and second that even if they were void for want of a description of the premises sought to be conveyed, yet as the appellant was claiming title by adverse possession, also under color of title, that we erred in upholding the ruling of the trial court in excluding them, because notwithstanding their invalidity and insufficiency to convey title, yet it is claimed they were sufficient to constitute color of title.

As to the first point we have to observe that there were three deeds in the alleged chain of plaintiff's, appellant's, paper title, of the rejection of each of which, as evidence, the appellant complains. In the original opinion, we only noticed two of them, holding their rejection justified, because they did not contain any description of the land, and that that was fatal to plaintiff's case, regardless of the question as to the rejection of the other one.

Counsel now contend that that was error, because the first of the two thus passed on, though containing

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no description of land whatever, yet they claim it contains a reference to the first of the three so offered, the one we did not pass on, and that that deed contains a description of the land. Authority is cited by them to the effect, that the deed thus referred to is in effect thereby incorporated into the deed making the reference, and that the description thus incorporated, will, if good, make the deed good. Conceding that to be the law and applicable, yet we find the reference is to a deed dated May 22, 1855, whereas the first rejected deed, to which they claim reference was made for a description, is dated May 19, 1855. But that is not the worst. That deed describes the land as the west half of the northwest quarter of section 22, instead of the west half of northeast quarter, the land in dispute, as appellant's counsel concede. They say they have no doubt that that was a clerical error of the recorder, "but it is impossible to remedy that error at this late day," they say.

That is rather a frank confession, that not only was the first rejected deed properly rejected by the court, but that the next one in the appellant's chain of title contains no description whatever, and refers to no deed for a description that contains a description of the land in question. But they ask us to take their word for it, that the land in question ought to be, though it is not, described in the deed referred to, and for that reason hold it good. No sufficient reason is stated or authority cited, authorizing courts to correct alleged mistakes in deeds and land titles without allegation or proof. To uphold appellant's position would be to make the ultimate rights of the respective parties litigant to depend, not upon allegation and proof, but upon the fact that the attorney on one side asserts the claims of his client with more vehe-

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mence than the attorney on the other. Justice is not so administered.

The third rejected deed refers to the second as follows: "All the right, title, and interest I have in the assets of the Bank of the United States, whether real, personal, or mixed, which remain unsold, and which were conveyed by Samuel Jordan and others, in their capacity as trustees, and otherwise by deed dated January 25, 1867."

The deed thus referred to, as we have already seen, contained no description of any land whatever, and though it referred to the previous deed for a description, that deed contained no description of the land in question whatever. The three deeds were all properly rejected as evidence of legal title.

Were they competent evidence of color of title? Counsel for appellant contend that they were.

Color of title is that which in appearance is title, but which, in reality, is no title. 1 Am. and Eng. Ency. of Law (2 ed.), 846, and authorities cited.

Color of title, unless expressly required by statute, is not essential to the acquisition of title by adverse possession. 1 Am. and Eng. Ency. of Law (2 ed.), 847, and authorities cited. *Sims v. City of Frankfort*, 79 Ind. 446; *State v. Portsmouth, etc., Bank*, 106 Ind. 435; *Roots v. Beck*, 109 Ind. 472; *L'Hommedieu v. Cincinnati, etc., R. W. Co.*, 120 Ind. 435; *Bowen v. Swander*, 121 Ind. 164; *Herff v. Griggs*, 121 Ind. 471; *Dyer v. Eldridge*, 136 Ind. 654.

The only difference between color of title by deed under adverse possession, and that by adverse possession without deed, is that in the case of a deed, the title extends to and includes the boundaries that are described in the deed, while in the case without deed, the title is confined to that which is actually occupied.

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1 Am. and Eng. Ency. of Law (2 ed.), 848, 849; *City, etc.*, v. *Lake Erie, etc.*, *R. R. Co.*, 130 Ind. 1.

The authorities are conflicting as to the effect which is to be given to defects in the title which are discoverable by inspection of the instrument, in rendering the purported conveyance inoperative as color of title. 1 Am. and Eng. Ency. of Law (2 ed.), 855, and authorities there cited. But the authorities seem to be agreed that in order that an instrument may confer color of title, it must contain a description of the land. 1 Am. and Eng. Ency. of Law (2 ed.), 858, 859, and authorities there cited; *City of Noblesville v. Lake Erie, etc.*, *R. R. Co.*, *supra*.

Therefore, the appellant was not entitled to introduce the deeds in question to establish color of title, because they were not sufficient to constitute color of title in the appellant.

Petition overruled.

RICHARD ET AL. v. CARRIE.

[No. 17,765. Filed May 12, 1896.]

TAX TITLE.—Regularity of Sale.—Evidence.—Burden of Proof Of.—Statute Construed.—Under the provisions of section 6480, R. S. 1881, and also section 8624, Burns' R. S. 1894, a tax deed is *prima facie* evidence of the regularity of the sale of the premises described in the deed, and of the regularity of all of the proceedings; and the holder of a tax deed is not required to support it with proof that the delinquent had no personal property at the time of the sale from which the tax might be collected.

145	49
147	80
145	49
154	858
155	574
145	49
166	333

From the Knox Circuit Court. *Affirmed*.

W. A. Cullop and *C. B. Kessinger*, for appellants.

H. S. Cauthorn, for appellee.

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HACKNEY, C. J.—This suit was by the appellee, who sought the ejectment of the appellants from lands, the title to which he claimed under a tax sale and deed. The sale was made in 1885, the deed was made in 1894, and the trial was had in 1895. There is but one question in the case: Did the burden rest upon the appellee to prove that at the time of the sale the delinquent owner had no personal property subject to sale for the payment of the taxes? In affirming that the burden so rested upon the appellee the appellants cite *Earle v. Simons*, 94 Ind. 573, involving a sale under the tax law of 1872.

In that case it was held that the holder of a tax deed was required to support it with proof that the delinquent had no personal property, at the time of the sale, from which the tax might be collected. This holding, it is urged by counsel for the appellee, was *obiter dictum*. The argument proceeds upon the erroneous assumption that the opinion discloses the presence of evidence in that case proving that the delinquent held personal property at the time of the sale. The evidence was of his having property at the time of the delinquency only. But, in our opinion, the overthrow of that case is not essential to the correctness of the lower court's holding, that the tax deed should stand without support from such evidence. In the tax law of 1881, that in force at the time of the sale in question, R. S. 1881, section 6480, and in the tax law of 1891, R. S. 1894, section 8624, that in force when the deed in question was made, and when the trial of this case was had, it was provided, that "Such deed shall be *prima facie* evidence of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, and *prima facie* evidence of a good and valid title in fee-simple in the grantee of said deed." No like provision was found in

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the law of 1872 and its effect was not considered in *Earl v. Simons, supra*. The power of the Legislature to so enact is not a question here, nor is it suggested that the language above quoted is not plain, and ample to cover the question in this case.

The judgment of the circuit court is affirmed.

BUCKLEN v. CUSHMAN.

[No. 17,782. Filed May 14, 1896.]

LANDLORD AND TENANT.—Action for Waste.—Pleading.—Complaint.

—A complaint does not sufficiently show waste by allegations of threats to remove furniture of a room, and that the plumbing will have to be taken out and the floor disturbed, without alleging that damage will result.

SAME.—Parol Lease.—Presumption.—Where the allegations in a pleading do not disclose a written lease, the presumption will be that the letting was by parol, and it will not be necessary that a copy be set out as an exhibit.

SAME.—Right of Tenant.—It is the right of a tenant to use leased premises for any lawful purpose, not forbidden by the expressed or necessarily implied construction of the lease.

PRACTICE.—Motion in Arrest of Judgment.—Dismissal by Court.—Dismissal of a cause by the court on motion in arrest of judgment for insufficiency of complaint, after a demurrer has been overruled and an exception reserved, without allowing an amendment, is error.

From the Elkhart Circuit Court. *Reversed.*

H. C. Dodge, for appellant.

Dodge & Hubbell, for appellee.

HACKNEY, C. J.—The appellant owned a building in the city of Elkhart, a part of which he leased to the appellee for hotel purposes, with the privileges of conducting a saloon in one of the basement rooms. At the same time one Kaskel occupied, as appellant's tenant, one of three storerooms on the first floor of

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said building for the sale of cigars and tobacco and as a billiard room. The business of this room was purchased by the appellee from Kaskel, and the same, together with the occupancy of said room, passed to the appellee "as the tenant * * from year to year" of the appellant, without any provision "for the sale of liquors in said room by" the appellee. The appellee obtained a license to sell intoxicating liquors, at retail, in said room, and, at the time this suit was instituted, was threatening to remove the saloon from said basement to said room. In addition to the foregoing facts, the amended complaint contained the following allegation: "That said storeroom contains a counter, of the value, to-wit, of \$200.00; shelving of the value of \$300.00; an ornamental partition of the value of \$100.00, and a tile floor of the value of \$500.00; that to put a saloon in said room, said room would have to have the said counter, shelving, and partition all removed out of and away from said room; that plaintiff's plumbing would have to be taken out of said basement and removed; that said floor would have to be torn up to put in plumbing in said room, which it would be necessary to have in said room if it were used for a saloon; all of which the defendant now threatens to do; and said saloon cannot be removed to said place without destroying said room; that said Cushman, while possibly not insolvent, has not sufficient means or property to respond to this plaintiff in the sum he will be damaged if said threat is carried out;" that "after removing said saloon business into said storeroom * * the damage to said hotel property, caused by a saloon being placed adjacent to the main office and most prominent room, will be, to-wit: \$15,000.00." It is also alleged that the hotel property is of the value of \$50 000.00, a large portion of which value is in its good name, good will,

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and established business, which will suffer irreparable injury by the removal of the saloon as threatened. Restraining order and injunction were prayed.

Appellee's demurrer to this amended complaint was overruled and an exception was reserved. Issue was formed, and upon the trial the court entered its finding as follows: "Come now the parties, and the court, after hearing the evidence adduced and the arguments of counsel, and being well and sufficiently advised in the premises, now finds for the plaintiff, that the material allegations of his complaint are true and proven; that he is entitled to a perpetual injunction against the defendant, Wilbur R. Cushman, restraining him from removing or interfering with the furniture described in the complaint, to-wit: shelving, partition, flooring, and counter, in room formerly occupied by Mike Kaskel, as described in the complaint, and also from conducting or operating a saloon for sale of intoxicating liquors at retail in quantities less than a quart at a time, to be drank on the premises, in said room, prior to the building of an extension to said room by plaintiff. And the defendant now moves the court in arrest of judgment."

The court sustained the motion in arrest of judgment, and dismissed the cause. This action of the trial court is assigned as error, and the action in overruling appellee's demurrer to amended complaint is assigned as cross-error.

Counsel for the appellee make no defense of the court's action in dismissing the appellant's suit, and we are at a loss to know how it can be sustained. Conceding the insufficiency of the complaint, against the demurrer and upon motion in arrest of judgment, the right to amend and proceed further could not be denied. Upon the theory that the complaint alleges a letting of the room by the appellant to the appellee,

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after the latter had procured a license to sell liquors, counsel for the appellee argue that appellant disclosed an estoppel against himself to question the proposed use of the room. This theory, we think, is not tenable. The fair construction of the complaint is that the appellee became the tenant of the appellant by virtue of his purchase from Kaskel, and not by direct lease.

Nor is it true that the allegations disclose a written lease of the room, either to Kaskel or to Cushman. The presumption, therefore, would be that the letting was by parol, and it would not be necessary, as counsel insist, that a copy should be made a part of the complaint.

Counsel are in error also in the position that the complaint alleged only an opinion as to the necessity for removing counters, shelving, partitions, floors, and the plumbing, and that no threat of the appellee to remove them was alleged. It was expressly alleged that it would be necessary to remove them, "all of which the defendant now threatens to do." The appellee's threat to remove them, for the purposes of the allegation in question, would be quite sufficient without an allegation as to the necessity therefor.

It is probably true, as counsel urge, that it is a right of a tenant to use leased premises for any lawful purpose, not forbidden by the expressed or necessarily implied construction of the lease. *Gear Landl. and Ten.*, section 97, p. 296; *Reed et al. v. Lewis et al.*, 74 Ind. 433. This proposition, however, has application only to the possible theory of the complaint, denying the right to use the room for the sale of intoxicating liquors, and not to the theory that the appellee was about to commit waste in the removal of counters, shelving, partition, plumbing, and floors. The latter theory is all that

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counsel for the appellant claims for the complaint, and he asserts no right, under the allegations, as to the uses of the room for a saloon. As to this theory of the complaint, there are very serious doubts of its sufficiency. It is not alleged that the furniture will be injured by the threatened removal; that the disturbance of the floor, to put in plumbing, will be permanent or injurious, nor is damage alleged by reason of such removal or disturbance. The allegation that "after removing said saloon business into said storeroom * * * as aforesaid, that the damage to said hotel property, caused by a saloon being placed adjacent to the main office and most prominent room, will be, to-wit: \$15,000.00," has no reference to the possible injury to the furniture and floor, or to the building. The allegation that the "saloon cannot be removed to said place without destroying said room," is but a conclusion, not supported by any alleged fact, and having no reference to any injury to the furniture, the disturbance of the floor, or the use of the room for a saloon. The aggregate value of the furniture and floor, as alleged, is but \$1,100.00, and the allegation of the appellee's inability to respond to the appellant's damages is not with reference to this sum, but is with reference to the alleged \$15,000.00 damages from locating a saloon in said room. The entire complaint bears evidence of having been hastily prepared, and upon the theory of charging waste, it is bad. We do not consider its sufficiency upon any other theory, since counsel claim nothing for it upon any other theory. We do not consider the rules as to the sufficiency of the complaint upon demurrer and upon motion in arrest of judgment, since the appellee, by his assignment of cross-error, is entitled to have the complaint tested as upon demurrer. Nor do we consider the question urged by the appellee,

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that no bond was given by the appellant upon his application for a restraining order or injunction. That question does not arise upon the assignment of cross-error.

The judgment is reversed, upon the error of the trial court in dismissing the appellant's suit, with instructions to reinstate the suit and to sustain the appellee's demurrer to the complaint, with leave to amend and for further proceedings.

FLETCHER v. MONROE ET AL.

[No. 17,870. Filed May 14, 1896.]

HUSBAND AND WIFE.—*Inchoate Interest of Wife in Husband's Real Estate.*—*Dower.*—*Effect of Divorce.*—*Statutes Construed.*—Where a wife has been divorced from her husband, on account of his misconduct, she is not entitled, on the death of the husband, to any interest in his real estate, under sections 2640, 2652, and 2660, Burns' R. S. 1894 (sections 2483, 2491, and 2499, R. S. 1881), conveyed by him during such marriage, and in the conveyance of which she did not join.

SAME.—*Divorce.*—*Effect of on Property Rights.*—*Alimony.*—A judgment of divorce settles all questions of the divorced wife to a provision by way of alimony, and such decree settles all questions concerning property rights, growing out of the marital relation.

SAME.—*Divorce.*—*Effect of on Property Rights, Where Divorce is Granted for the Misconduct of the Husband.*—*Statutes Construed.*—Section 1055, Burns' R. S. 1894 (section 1043, R. S. 1881), providing that, "a divorce granted for the misconduct of the husband shall entitle the wife to the same rights, so far as her real estate is concerned, that she would have been entitled to by his death," has reference to her separate real estate, and does not apply to her husband's real estate.

From the Marion Superior Court. *Affirmed.*

W. F. Bernheimer, and Blackledge & Thornton,
for appellant.

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Van Voris & Spencer, and J. E. Franklin, for appellees.

MCCABE, J.—Appellant brought suit for partition, against the appellees, alleging that she was the owner of one-third of the real estate, in her complaint described. The issues formed were tried by the court, without a jury, resulting in a special finding of the facts, on which the court stated certain conclusions of law, leading to judgment for the defendants. The conclusions of law are assigned for error.

The substance of the facts found are that the appellant and Timothy R. Fletcher were husband and wife. During that marriage relation he conveyed the real estate described in the complaint without appellant, his then wife, joining in the deed of conveyance, he being the owner in fee-simple of the property. Appellant thereafter obtained a divorce from him, for his fault, and afterwards he died. The conveyance was executed in 1859, and the divorce obtained February 6, 1874.

The conclusions of law were to the effect that the plaintiff had no interest in the real estate. Her counsel contends that such conclusions of law are in conflict with the following statutory provisions, namely: "If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee-simple," etc. R. S. 1894, section 2640 (R. S. 1881, section 2483).

"A surviving wife is entitled, to * * * one-third of all the real estate of which her husband may have been seized in fee-simple at any time during the marriage, and in the conveyance of which she may not have joined in due form of law," etc. R. S. 1894, section 2652 (R. S. 1881, section 2491).

"No act or conveyance, performed or executed by

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the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer, or incumbrance of the husband's property, etc., * * * shall prejudice or extinguish the right of the wife to her third of his lands, etc., * * * or preclude her from the recovery thereof, if otherwise entitled thereto." R. S. 1894, section 2660 (R. S. 1881, section 2499).

The first of the above sections confers the right only upon the surviving widow, the second on the surviving wife, which means the same thing. They both mean to confer the right upon the surviving widow. The last section only, has reference to the right conferred by the other two sections.

A divorce granted to one party, fully dissolves the marriage relation as to both. R. S. 1894, section 1060 (R. S. 1881, section 1048).

The appellant, therefore, was not the surviving widow of Timothy R. Fletcher, and had no rights as such, regardless of the question as to whose fault it was that brought about a dissolution of the marriage relation between them.

Timothy R. Fletcher had a right to remarry, and may have done so, and left surviving him a real widow. He could not leave two lawful widows. The woman he married after the divorce from the plaintiff, if the marriage continued until his death, would certainly be his widow, which necessarily would exclude the appellant as to lands of which he died seized. She is now no more his widow than if he had married a second wife, and died during the continuance of that relation.

A judgment of divorce settles all questions of the right of the divorced wife to a provision by way of alimony. *Nicholson v. Nicholson*, 113 Ind. 131. And

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such a decree is in lieu and bar of her interest in the real estate of her husband. *Musselman v. Musselman*, 44 Ind. 106; *Rice v. Rice*, 6 Ind. 100; *Green v. Green*, 7 Ind. 113; *Rourke v. Rourke*, 8 Ind. 427; *Stafford v. Stafford*, 9 Ind. 162; *Hart v. Hart*, 11 Ind. 384; *Chandler v. Chandler*, 13 Ind. 492; *Cox v. Cox*, 25 Ind. 303; *Coon v. Coon*, 26 Ind. 189; *Conner v. Conner*, 29 Ind. 48; *Hyatt v. Hyatt*, 33 Ind. 309.

And such a decree settles all questions concerning property rights, growing out of the marital relation, though the separate property of the wife is not affected by the decree. *Rose v. Rose*, 93 Ind. 179, *Behrley v. Behrley*, 93 Ind. 255; *Hills v. Hills*, 94 Ind. 436; *Yost v. Yost* 141 Ind. 584.

It is contended, however, that another section of the statute has some influence on the question here. It provides that: "A divorce granted for misconduct of the husband, shall entitle the wife to the same rights, so far as her real estate is concerned, that she would have been entitled to by his death." R. S. 1894, section 1055 (R. S. 1881, section 1043). That section has been held correctly, we think, to mean the separate real estate of the wife, and has no reference to her husband's real estate. *Lash v. Lash*, 58 Ind. 526.

Therefore the superior court did not err in its conclusions of law.

HILBISH v. HATTLE.

[No. 17,880. Filed May 15, 1896.]

DIVORCE.—Non-resident Defendant.—Collateral Attack.—Where notice is given to a non-resident defendant in a divorce proceeding, as is provided by the statutes of the state in which such proceedings

145	59
149	163
145	59
156	86
145	59
168	357

Hilbish v. Hattle.

are had, the judgment of divorce will be secure against collateral attack.

SAME.—*Constructive Notice.—Effect of Divorce on Property Rights of Non-resident Defendant.—Statutes Construed.*—Where the husband obtains a divorce from his wife by constructive notice, the wife being a non-resident of the state in which the divorce proceedings were had, such divorced wife could not, under the statutes of this State, section 2660, Burns' R. S. 1894 (section 2499, R. S. 1881), and sections 1060, 1061, Burns' R. S. 1894 (sections 1048, 1049, R. S. 1881), have any rights in his property by virtue of any marriage relations with him, although said court did not, in such divorce proceedings, adjudicate the property rights of the parties.

SAME.—*Post-nuptial Contract.—Effect of on Inchoate Interest of Wife.*—Where a post-nuptial agreement is made by a husband and wife in division of property, prior to a separation and divorce, in all respects fair and adequate in proportion to the property of each, and the portion of the property therein given to the wife was received by her in full of all demands against her husband, and in full of her inchoate rights or contingent rights in his property as his wife or his widow, such contract will be upheld, and will bar a recovery by the divorced wife of any interest in the estate of the husband at his death, by virtue of the former marital relations.

From the Elkhart Circuit Court. *Affirmed.*

Osborne & Zook, for appellant.

F. E. Baker and *C. W. Miller*, for appellee.

HOWARD, J.—This was an action for partition, brought by appellant against appellee, asking that one-third in value of certain lands described in the complaint, and formerly owned by Jacob Hilbish, deceased, be set apart to her as surviving wife of said decedent, said lands having been conveyed by her said husband during their marriage, without her having joined in such conveyance.

The appellee answered in general denial, and also filed a cross-complaint, asking to quiet his title to the lands claimed by appellant.

The court, at the request of the parties, made a special finding of the facts in the case, from which it appears: That the appellant and her said former

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husband, Jacob Hilbish, were married in Union county, Pennsylvania, in 1839, removing to Elkhart county, Indiana, in 1874, where appellant has ever since resided; that appellant and the said Jacob Hilbish ceased to live together as husband and wife in 1877; that on February 24, 1877, appellant brought suit for divorce and alimony, to which the said Jacob filed a cross-complaint; which complaint and cross-complaint were dismissed October 4, 1877; that, on March 13, 1878, appellant filed her complaint against her said husband on an account for money, to the amount of \$6,000.00, which she claimed to have loaned him at various times during their marriage; that pending said last suit, on May, 30, 1878, the parties entered into the following agreement:

“This agreement witnesseth, that said Jacob Hilbish and Susannah Hilbish, being husband and wife, and there being irreconcilable differences between them, by reason of which they have separated and do not contemplate again living together as husband and wife; and as a proper and just division of their property, the said Jacob has this day conveyed to the said Susannah Hilbish one hundred acres of land in section 4, T. 36, N. R. 6 E., in Elkhart county, Indiana. Now, therefore, the said Jacob Hilbish agrees to remove from said lands all incumbrances and deliver the same to the said Susannah Hilbish, together with all the crops, buildings, and appurtenances thereunto belonging, free from all incumbrances; and when such incumbrances are removed the said Susannah shall accept the said deed and lands in full of all claim upon said Jacob, either for moneys heretofore loaned him, or other demands against him, and in full of all her inchoate rights or contingent rights in his property as his wife or as his widow, if she should survive him; and in full of all her claims upon him for her future

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support and maintenance; and she hereby releases him and his estate from all demands and claims in any way arising out of any of said matters. It is further agreed, that the suit now pending in the Elkhart Circuit Court shall be dismissed at the costs of the defendant herein, and, that the said Susannah shall not hereafter contract any debts against the said Jacob, nor look to him in any manner for her support or expenses, and that a separation between the said parties is hereby effected by mutual consent; and, in consideration of the premises, the said Jacob Hilbish hereby agrees and does release and surrender all his rights, inchoate and contingent, in the said real estate so conveyed to the said Susannah Hilbish, and in and to all her separate estate or property that she now has, or may have, or become seized of hereafter, and hereby releases her and her estate, if he should survive her, from all demands for services and earnings, and all claims, contingent or otherwise, by reason of the said marital relations between them. The intent of this agreement being that as to all the property hereafter acquired or now owned by either of said parties, the same shall be free from all claims by the other, either while they live or after either of them may die."

The court further finds, that, in making said agreement said Susannah Hilbish was represented by Judge J. D. Osborne, as her attorney, and said Jacob Hilbish was represented by Judge H. D. Wilson, as his attorney, and said agreement was fairly and intelligently entered into; that, on said day and prior thereto, said Jacob Hilbish was the owner of the lands described in the complaint, then of the value of \$7,000.00, and the one hundred acres described in said agreement, then of the value of \$9,000.00, and encumbered to the amount of \$4,496.00; and was the owner of other lands in Goshen, Indiana, in Ohio, and Pennsyl-

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vania, worth over \$22,000.00, besides real estate in Missouri and Kansas; that he was, at said time, indebted in the sum of \$10,000.00; that appellant's claim in the said suit then pending, and all the property of the said Jacob Hilbish, as well as his said indebtedness, were considered in making said agreement, and it was estimated and considered by the parties thereto that the said one hundred acres of land described in the agreement was a reasonably fair provision for said Susannah, as the wife of said Jacob Hilbish, at that time; and she dismissed her said suit against him; that on said day, and in pursuance of said agreement, the said Jacob Hilbish conveyed to said Susannah said one hundred acres, by warranty deed, stating therein that said land was conveyed to her "as her own separate property, with full power and authority to sell, convey or encumber the same by her own separate deed and contract, in every respect as though she were unmarried," and "the consideration of the same being a final settlement and adjustment of the property rights between the grantor and the grantee upon the separation this day effected between them;" that the said Jacob Hilbish fully performed all the stipulations of said agreement on his part, except the payment of a small amount of taxes on said land; that the appellant, on said day, and by virtue of said agreement and deed, took possession of the said one hundred acres, and has ever since been in possession thereof, claiming the same as her own; that, on January 28, 1879, the said Jacob Hilbish, by his deed, appellant not joining, conveyed the land described in the complaint for \$6,000.00, under which deed, through *mesne* conveyances, appellee claims title to the land, having purchased the same for \$7,000.00 and gone into possession; that, on January 10, 1894, appellant executed a power of attorney to one James Hil-

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bish, authorizing him to recover for her, her interest as surviving wife or widow in any and all lands owned by the said Jacob Hilbish, this suit being brought February 13, 1895; that the appellee had no notice of the execution of said power of attorney until the summons in this cause was served upon him, other than that before purchasing the land, in 1883, appellant's son informed him that his mother claimed an interest in the land; that at the May term, 1879, of the Elkhart Circuit Court, Jacob Hilbish filed his complaint for divorce, to which said Susannah filed her answer and cross-complaint, which complaint and cross-complaint were both dismissed; that, in the summer of 1879, Jacob Hilbish removed to Daviess county, Missouri, where he resided for five years, then moving to Ohio, where he lived three years, after which he returned to Daviess county, Missouri, where he continued to reside until his death, August 15, 1893; that, on December 31, 1880, Jacob Hilbish filed his petition for a divorce against appellant in Daviess county, Missouri; that, on the 7th day of the February term, 1881, of said court, an interlocutory decree of divorce was granted on said petition; and at the June term, 1881, of said court, "a judgment and decree of divorce was rendered and entered of record by said court, in said cause of *Jacob Hilbish v. Susannah Hilbish*, granting the said Jacob Hilbish a divorce from the bonds of matrimony existing between said Jacob Hilbish and Susannah Hilbish, and that said judgment remains in full force."

The full proceedings of the action for divorce in Daviess county, Missouri, are set out in the special findings, as are also the statutes of Missouri in relation thereto.

The conclusions of law made by the court on the special findings of facts were:

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"1. That the plaintiff is not the widow or surviving wife of said Jacob Hilbish, and is not entitled to recover on her complaint.

"2. That defendant is the owner of the land described in the complaint and cross-complaint, and that his title thereto should be quieted.

"3. And that defendant should recover of plaintiff his costs."

The errors, assigned on this appeal and discussed by counsel, call in question the correctness of the conclusions of law.

It is first insisted by appellant that, "it is not found by the court that the apparent decree of the Missouri Court is a decree or judgment of any court, nor that it was ever rendered by that or any other court; nor that if such a judgment ever existed, it was still in force at the death of Jacob Hilbish."

We confess that we are unable to understand this contention of counsel. The proceedings of the Missouri court are, as we have said, set out fully in the findings. In addition, as we have also shown, the court expressly finds that "a judgment and decree of divorce was rendered and entered of record by said court, in said cause * * * and that said judgment remains in full force."

Moreover, counsel admit that the setting forth in the findings of the proceedings in the Missouri court, and of the Missouri statutes "indicates that the trial court had evidence before it from which, if not controverted or disproved, it might have found one way or the other on the question." What further would counsel have?

It is said that the Missouri statute requires an affidavit of non-residence in case of publication of notice to defendants in divorce proceedings, or of serv-

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ing such defendants personally, when they are not residents of the State of Missouri, and that it does not appear, from the record, that such affidavit was ever filed. But, in its interlocutory judgment, the Missouri court held that the appellant, defendant in that suit, was "duly summoned as the law directs," while the summons, served in Pennsylvania, with its proof of service, was in fact duly made as required by the statute in case of non-residents. That is quite sufficient to withstand this collateral attack upon the judgment of the Missouri court. Like answer may be made to the objection that it was not shown, in the petition for divorce, that Jacob Hilbish was at the time a resident of Daviess county, Missouri. The court, by its finding and decree, passed also upon that jurisdictional fact, and the same will not here be called in question.

In 1 Black. Judg., section 240, the author, citing *Bumstead v. Read*, 31 Barb. 669, says: "Where the judicial tribunal has general jurisdiction of the subject-matter of the controversy or investigation, and the special facts which give it the right to act in a particular case are averred and not controverted, upon notice to all proper parties, jurisdiction is acquired, and cannot be assailed in any collateral proceeding."

In 1 Freeman Judg., section 127, it is said, citing cases: "The position is taken that presumptions of regularity are applicable to proceedings of courts of record, not because of the particular means which those tribunals happen to employ, under the authority of the law, for the purpose of acquiring jurisdiction over the defendant, but because of the high character of the courts themselves; and that this character is essentially the same in all cases, irrespective of the method employed in the service of process. Therefore,

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the fact that the affidavit required by law to precede and authorize the order for publication does not appear from the record will not make the judgment vulnerable to collateral attack."

Appellant's authorities only go to show that a defendant brought in by notice of publication only, or by personal service in another state, which is equivalent to notice by publication, cannot suffer a personal judgment. If, however, such notice is given to a non-resident defendant in a divorce proceeding, as is provided by the statutes of the state, the judgment of divorce will be secure against collateral attack. Such judgment acts upon the marriage *status* of the parties; and the court having jurisdiction of the plaintiff has power, after notice given to parties in interest, to determine the *status* of such plaintiff. The court acts by virtue of the citizenship of the party before it. And the marriage relation of the plaintiff being dissolved, the parties are no longer husband and wife.

But it is further contended, by appellant, that even if the decree of divorce rendered by the circuit court of Daviess county, Missouri, should be held valid, still that court, not having acquired jurisdiction over the person or property of appellant, such judgment or decree could not affect any property rights which appellant might have in this State. And section 2660, R. S. 1894 (section 2499, R. S. 1881), that no act of the husband, without his wife's assent, and no disposition of his property "by virtue of any decree, execution or mortgage to which she shall not be a party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto," is cited in support of such contention. Citing, also, *Grissom v. Moore*,

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106 Ind. 296; Van Fleet Col. Attack, sections 390, 391, and other authorities there referred to.

But appellant was a party to the decree of divorce, although, being served only with constructive notice, no judgment could be rendered against her. However, by sections 1060, 1061, R. S. 1894 (sections 1048, 1049, R. S. 1881), it is provided that "The divorce of one party shall fully dissolve the marriage contract as to both," and also that "A divorce decreed in any other state, by a court having jurisdiction thereof, shall have full effect in this State." It would seem, therefore, that appellant, not being the surviving wife of Jacob Hilbish, could not, according to the statutes of this State, have any rights in his property by virtue of any marriage relation with him during his life time. *Fletcher v. Monroc*, ante, 56. The Missouri court did not attempt any adjudication upon her rights or property in this State. But that court, after jurisdiction duly had, did determine the *status* of her former husband, Jacob Hilbish, and did decree a divorce to him, thus severing the marriage bond that united him to appellant. By force of our statutes, above quoted, it would seem that the same consequences followed that would have followed if the decree had been rendered in this State.

But even if the property rights of the parties were not fixed by the decree of divorce, still, we think, that the post-nuptial contract, shown in the special findings, would be sufficient to support the conclusions of law in favor of appellee. By that contract, the appellant received one hundred acres of land, worth \$9,000.00, as in full of all claims of appellant, present or prospective, upon her husband or his estate, including any inchoate or contingent interest she might have as his surviving wife. This contract was found by the parties at the time to be her fair share of the estate,

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taking into account all her husband's property and all his debts. She was, in that negotiation and contract, represented by able counsel, and it would seem that all her rights were fully protected. It is the policy of the law that such just and fair provisions for the wife's support shall be respected and carried into effect. In case of a suit for divorce or alimony, the law requires that such provision shall be made for the wife; and when a voluntary agreement is made, either before or after marriage, if it is, in all respects, fair and adequate in proportion to the husband's property, the contract will be maintained. *Randles v. Randles*, 63 Ind. 93.

In *Hollowell v. Simonson*, 21 Ind. 398, it was said: "We understand it to be well settled, upon ample authority, that a relinquishment of dower by the wife, the husband being then alive, is a good and valuable consideration for a conveyance by the husband, or procured by him, to the wife, of property which may be considered but a fair equivalent; and that the same will be viewed as valid, or not, as it may be shown to be fair or fraudulent, and the comparative value of the respective estates and interests may be taken into consideration. *Levinz*, 146; *McCann v. Letcher*, 8 B. Mon. 326; *Ward v. Shallet*, 2 Vesey, Sen. 16; *Atherley Marriage Settle.*, 162."

This statement of the law is quoted and approved in *Brown v. Rawlings*, 72 Ind. 505, where it is held that an agreement by a husband to convey certain lands to his wife in consideration that she would relinquish her inchoate interest in his lands, which she did, is valid, even though such agreement is not in writing.

And in *Jarboe v. Severin*, 85 Ind. 496, this court said: "The release by a wife of her inchoate interest in her husband's real estate may be a valuable consideration. *Hollowell v. Simonson*, *supra*; *Brown v. Rawlings*,

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supra. In *Faricell v. Johnston*, 34 Mich. 342, it is said: 'It has always been held that a release by a wife of an interest which was within her option to release or not—as, for example, a right of dower—is a valuable consideration, which will support a post-nuptial settlement, and therefore will suffice for any other purpose.'” See also *Copeland v. Copeland*, 89 Ind. 29; *Worley v. Sipe*, 111 Ind. 238.

In *Dutton v. Dutton*, 30 Ind. 452, Chief Justice Ray, speaking for the court, it was said that the following instruction fairly stated the law and should have been given: “That a parol agreement made between husband and wife in view of separation, and fully executed on the part of the husband, wholly for a consideration which, in the light of all the circumstances of the parties at the time the contract is made, is fair, reasonable, and just, the contract will be upheld.”

That such a contract between husband and wife, when fair to all parties, will be upheld in equity. See *Sims v. Rickets*, 35 Ind. 181; 9 Am. and Eng. Ency. of Law, 792; 14 Am. and Eng. Ency. of Law, 552, and authorities cited in notes.

The contract, in the case at bar, was found by the court to have been made in view of all the property of Jacob Hilbish, and that “it was estimated and considered by the parties thereto that said one hundred acres of land, described in said agreement, was a reasonably fair provision for said Susannah, as the wife of said Jacob Hilbish, at that time.”

The contract was in writing, made with the advice of eminent counsel, was “in view of separation,” was “fair to all the parties,” was received by her in full of all demands against him, and, “in full of her inchoate rights or contingent rights in his property as his wife or his widow.” The contract has never been rescinded; she still holds the land conveyed to her by virtue of

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the terms of the contract. She has made no election, as provided in section 2665, R. S. 1894 (section 2504, R. S. 1881), even if this were a jointure for her use, and such election might be made.

We see, therefore, no reason why this contract and deed of settlement should not be upheld, without considering the question, if any there be, as to the effect upon appellant's rights of the decree of divorce, granted to her husband in Daviess county, Missouri. The second and third conclusions of law, being in favor of appellee, were clearly correct, and quite sufficient to sustain the judgment of the court.

"If the ultimate judgment deals justly with the parties, gives to each his legal rights, and is sustained by the facts appearing in the special finding, an error in one of the conclusions of law will not justify a reversal." *Slauter v. Favorite*, 107 Ind. 291; *Waters v. Lyon*, 141 Ind. 170.

Judgment affirmed.

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[No. 17,894. Filed May 15, 1896.]

CONSTITUTIONAL LAW.—*Amendment of Constitution Repeals Inconsistent Legislative Acts.—Repeal by Implication.*—A constitutional amendment inconsistent with previous legislative enactments operates to repeal such enactments. *p. 75.*

SAME.—*Unconstitutional Apportionment Act.—Repealing Clause.*—Where it appears from the repealing clause of an apportionment act, that it was only intended to repeal the former apportionment upon the supposition that the new one was to take the place of the former, the former act will not thereby be repealed, if the new act is unconstitutional. *p. 76.*

SAME.—*Apportionment Act.—Public Policy.*—Where there is but one act apportioning the State for legislative purposes that has not been repealed, an action will not lie to invoke the powers of the court to declare it unconstitutional. *p. 87.* MONKS, J., dissenting.

145	71
151	273
151	290
145	71
157	285
145	71
162	577

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From the Marion Superior Court. *Reversed.*

Hawkins & Smith, for appellants.

M. E. Forkner, A. C. Harris, and Miller, Winter & Elam, for appellee.

MCCABE, J.—The appellee sued the appellants in the superior court, to enjoin them from proceeding to hold the election in November for members of the next general assembly, under the provisions of the apportionment act, approved March 6, 1885. It was alleged that the appellants, being the clerk of the circuit court, the auditor, and the sheriff of Marion county, Indiana, were threatening to give notice and proceed to an election under said act, which act, it was alleged, is unconstitutional for the same reasons that the apportionment acts of 1879, 1891, 1893, and 1895 were adjudged by this court to be unconstitutional in *Parker v. State*, 133 Ind. 178, and in *Denny v. State, ex rel.*, 144 Ind. 503.

The superior court overruled a demurrer to the complaint for want of sufficient facts, and the defendants declining to plead over and standing upon their demurrer, the court rendered judgment perpetually enjoining said officers from proceeding to hold said election under and pursuant to said act.

The ruling upon the demurrer is the only error assigned.

A motion to dismiss the appeal is made by Alonzo G. Smith, Charles A. Korbly and John W. Kern as *amici curiae*, and on behalf of certain other parties, who are not parties to the action, and who, it is alleged, would be injuriously affected by the litigation.

In support of this motion is filed an affidavit of Sterling R. Holt, to prove the charge made in the motion that "the controversy is not real, that all the parties thereto are agreed in principle and purpose

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concerning the same, and that said action, from its inception, has been and is collusive and the result of collusion between the parties thereto, all of whom are desirous of obtaining from this court an affirmance of the judgment appealed from, there being no adverse interest represented."

If these facts were conceded, or clearly shown by the affidavits and record, we should feel compelled to sustain the motion, as the law is well settled that such a litigation may and ought to be regarded as a contempt of court. *Hoover v. Hanna*, 3 Blackf. 48; *Brewington v. Lowe*, 1 Ind. 21; *Hotchkiss v. Jones*, 4 Ind. 260; *Smith v. Railroad Co.*, 29 Ind. 546; *Osborn v. Bank of U. S.*, 9. Wheat. 737; *Lord v. Veazie*, 8 How. U. S. 251; *State, ex rel., v. Napton* (Mont.), 25 Pac. Rep. 1045; *Haley v. Eureka Co. Bank* (Nev.), 12 L. R. A. 815.

Counter affidavits have been filed by the parties and counsel in opposition to the charge of collusion. Other circumstances have occurred in this court tending to overcome the charge. But we deem the merits of the controversy of so much importance to the people that we do not pass upon the conflict raised by the affidavits, and will pass the question of dismissal without decision. The brief, on behalf of the appellants, makes a point for reversal which is entitled to much consideration, namely, it is therein contended, with much apparent earnestness, that "the act of 1885 was accepted by the people, and acted upon without question, and three successive general assemblies were elected under it before any further legislation upon the subject was attempted, and before any question of its constitutionality was raised, and * * * no attempt was ever made or suggested to test its validity or constitutionality in the courts. The law having been accepted and acted upon, as it has been without

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question by the people, * * * we insist that it is now too late to raise the question as to its validity upon the grounds stated in the complaint."

This contention is not without weight or merit, especially as this is an attempt to invoke the equity powers of the court by injunction. "Equity aids the vigilant, not those who slumber on their rights. * *

* The principle thus used as a practical rule, controlling and restricting the award of reliefs, is designed to promote diligence on the part of suitors, to discourage laches by making it a bar to relief, and to prevent the enforcement of stale demands of all kinds, wholly independent of any statutory periods of limitation. It is invoked for this purpose in suits for injunction, suits to obtain remedy against fraud, and in all classes of cases, except, perhaps, those brought to enforce a trust against an express trustee. * * *

A court of equity which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence." 1 Pomeroy Eq. Jur. (1 ed.), sections 418, 419; *Brashear v. City of Madison*, 142 Ind. 685; *Jones v. Cullen*, 142 Ind. 335; *Rumsey v. People*, 19 N. Y. 41.

In addition to the fact that the appellee does not point out any other apportionment act than that of 1885, or claim that any such exists, under which an election may be held, we may observe that he agrees with the contention of the *amici curiae*, that all legislative apportionment acts previous to that of 1879, under the present constitution, including the apportionment act under which that constitution required the first and second legislative elections to be held, were required to be, and were, based on an enumera-

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tion exclusively of the white male inhabitants of the State. Section 2, Art. 3, Const. 1816, R. S. 1843, p. 44; Const. of 1851, sections 3, 4, 5, Art. 4, R. S. 1852, pp. 48 and 49; Enumeration Act of 1865, Acts of 1865, p. 41, R. S. 1881, sections 4780, 4798; Supp. Enumeration Act of 1877, Acts of 1877, R. S. 1881, section 4799 (R. S. 1894, section 6370).

By the amendment to the constitution of March 14, 1881, the sections of the constitution above referred to, were so amended as to require such enumerations and apportionments to be based on the number of male inhabitants of the State, over the age of twenty-one years, both white and colored. R. S. 1894, sections 99, 100, and 101 (R. S. 1881, sections 99, 100, and 101).

All the apportionment acts, therefore, which preceded that of 1879, being based exclusively on the white male inhabitants of the State above the age of twenty-one years, and leaving out all colored males of that age, are wholly inconsistent with the requirements of the constitution since its amendment above mentioned, requiring all colored, as well as white, males, over twenty-one years of age, to be represented in the apportionment for legislative purposes.

It is settled law, in this and other states, that a constitutional amendment, inconsistent with previous constitutional provisions and legislative enactments, operates to repeal such constitutional provisions and legislative enactments. *Griebel v. State, ex rel.*, 111 Ind. 369, and authorities there cited; *Pierce v. Delamater*, 1 Comstock, 17; *Potters Dwarries Statutes*, 113; *Sedg. Statutory Law*, 107.

The learned counsel for appellee not only frankly concede, but earnestly insist, that all apportionment acts prior to that of 1879 have been repealed by the above mentioned constitutional amendment, and that

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the only act not so repealed or declared by this court to be unconstitutional, is that of 1885. So that it is undeniable that all legislative apportionment acts, previous to that of 1879, have been effectively repealed. All apportionment acts, subsequent to that of 1885, as well as the act of 1879, have been adjudged unconstitutional by this court. *Parker v. State, supra*; *Denney v. State, supra*. There are several reasons why the act of 1885 has not been repealed.

1. There has been no constitutional amendment, either State or federal, adopted since its enactment inconsistent with its provisions.

2. The several apportionment acts of 1891, 1893, and 1895, assuming to supersede it, having proven unconstitutional, the repeal in each one of these acts, falls to the ground by the settled adjudication of this court, because it appears, from the several repealing clauses, that it was only intended to repeal the former apportionment acts upon the supposition that the new act was to take the place of the former acts upon the subject. *Denney v. State, supra*; *State, ex rel., v. Blend*, 121 Ind. 514, and cases there cited. And a third reason is that it is justly held, in *Denney v. State, supra*, that the legislature may not wantonly sweep away all means of electing another legislature.

Thus we are confronted with the preliminary question, to be determined before we enter upon the investigation of the alleged unconstitutionality of the apportionment act of 1885. And that question is, can the appellee have any right to invoke the power of this court to dissolve the State government? Can any citizen of this State have the right to invoke the power of the judiciary by injunction to put an end to the government that protects his life, his liberty, and his property?

The proposition the appellee presents, stripped of

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all subterfuges, is that unless the Governor shall convene the legislature in extra session, there shall be no more elections of legislatures in this State under our constitution. But suppose we respond to the demand of the appellee, and, having entered the field of investigation, find the act of 1885 defective, and strike it down, and start the people of this State on a voyage that may lead them into the troubled sea of anarchy; and suppose, even, that the Governor shall forego his resolution not to call an extra session of the legislature, and should actually convene it, and it should refuse to act, or, consenting, should pass another act as bad as the one passed in 1895, and which this court should be compelled to declare unconstitutional? The government of the State would be at an end. As was said in *Denney v. State*, *supra*, the people in the constitution have provided that all officers, except members of the legislature, shall hold their respective offices during the term for which they were elected and until their successors are elected and qualified. We may notice, in passing, that such provision points unerringly to the design of the framers of the constitution that the functions of government, executive and administrative, should not come to an end for want of persons authorized to perform them. But as to members of the general assembly, for important and obvious reasons, a different rule was provided. That rule is that each member's official career and authority ends with the end of the term for which he is elected, whether his successor is elected or not. Therefore, if there is no law in force for the election of a legislature, and the existing legislature expires without enacting such a law, the legislative department of the State government is at an end. The other two departments must soon expire, if there be no legislative department. A careful study of the whole

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subject convinces us that it was the intention of the framers of the supreme law to impress on its every feature the principle of perpetuity in the government. If the scheme of the appellee may be effectuated, that noble aspiration of the founders of our State government may be defeated at the suit of a single individual, by the invocation of the power they vested in the judiciary. As before observed, if the legislative department may be thus annihilated, the other two departments must soon perish for want of sustenance by the legislative department. And all departments being thus extinguished, the constitution also must die. Because, in that event, society must be reorganized, and the constitution would have no force unless adopted by the new organization. As well ask this court to overthrow, not one provision of the constitution, but every provision of the whole constitution. The case before us, though undoubtedly not so intended, is, in reality, an attack upon the integrity of the State government. This court, while free to consider and decide causes at such times and in such manner as to it shall seem right and proper, under the constitution and the law, yet can never be authorized so to act as to put an end to its own existence, or to the existence of any co-ordinate branch of the State government. Any law, however defective, must stand so long as such law is necessary for the continued movement of the political organization formed by the people. It was in this spirit that the framers of the constitution provided, in Art. 4, section 5, "That the first and second elections of members of the general assembly, under this constitution, shall be according to the apportionment last made by the general assembly before the adoption of this constitution."

A reference to the apportionment so confirmed will

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show that it was not constructed in accordance with the provisions of the supreme law itself; and yet, it is confirmed and adopted for the simple and all sufficient reason that some law was necessary under which a legislature might be chosen. Even a defective law would be upheld, rather than that there should be no law for the election of a general assembly.

The constitution of the United States itself would compel the recognition of such a law for the election of a legislature as valid, at least until another could be enacted to take its place. In Art. 4, section 4, of the Federal Constitution, it is provided that, "The United States shall guarantee to every State in this Union a republican form of government;" and it is impossible for us to conceive of a republican form of government without the election by the people of representatives in the general assembly.

The principle which required that the last apportionment law under our old constitution should be held valid, and which requires, also, that the law of 1885 should be held valid, notwithstanding any constitutional defect which might exist in either, is not essentially different from the principle, in accordance with which invalid proceedings in the government of municipalities are legalized by acts of the legislature, namely, that the life of the municipality, in the one case, and the State, in the other, should be preserved. The State cannot die; and neither this court nor any other tribunal is authorized to do aught that may endanger its existence.

In like manner, in a constitutional monarchy, it is not admitted that any interval of time exists between the death of one ruler and the accession of another. The cry of the herald is the voice of the law: "The king is dead; long live the king!" So here, also, when a great president was stricken down by the hand of

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an assassin, there was heard, in the voice of one destined to be his successor, that sublime and inspiring declaration, "The government at Washington still lives!" It will not be admitted, either in the nation or in the State, that the government, or any of its co-ordinate branches, shall ever cease to exist. The machinery set in motion by the people for the creation of the legislature, the executive, and the courts, is, so to say, a living organism, and can never cease to act. Least of all, should the judiciary, the guardian of the constitution, aid in destroying the government, which has its very being in the constitution.

The learned counsel for the appellee do not deny that these consequences would follow the overthrow of the act of 1885, in case of failure of the Governor to convene the legislature in time to pass a new apportionment act previous to the approaching November election, or, in case of his convening that body, it should fail to pass a valid apportionment act. But some of them insist that the idea that the executive or legislature either will fail to do their duty, is unthinkable. We presume counsel mean, by this word, that it is impossible to grasp the idea with our thoughts that the Governor will, or might fail to convene the legislature in time, or that the legislature might fail to pass a valid apportionment law, in time for the election in November next. We find no difficulty whatever in grasping the idea.

The like has happened before. Both the Governor and the legislature have heretofore failed in duty, as to apportionment laws in a marked and startling manner, as we shall see further on.

But, if we are bound to presume that the Governor and the legislature will perform the duty resting on each, in case the act of 1885 is void and out of date,

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then there is no cause for interference by a court of equity by the strong arm of injunction.

The court being bound not to think the unthinkable idea that those departments will fail in their duty, there is no necessity for interference by a court of equity. There must be such a necessity, or no right to such relief can be demanded. See the authorities cited further on as to this point. See also 10 Am. and Eng. Ency. of Law, 779, 782, and authorities there cited in notes, and especially note 1, beginning on page 779. Others of appellants' learned counsel urge that we must enter the field of investigation of the unconstitutionality of the act, regardless of consequences. That is, as we interpret their contention, we are bound to go forward, even though we dash the people over the precipice into the bottomless pit of anarchy, and let the consequences take care of themselves. Such a doctrine is utterly inadmissible. It is an established principle of equity jurisprudence, that if there is "a probability that more wrong will be done than prevented by the injunction prayed for, it will not be granted." 10 Am. and Eng. Ency. of Law, 783, and authorities cited.

It is a matter of current history and common notoriety, as also appears by the record, that the persons who have finally consented to lend this suit their sanction and support, saw clearly the perilous sea into which it was likely to lead the ship of State, and entered their solemn and patriotic protests, and yielded only such consent on a formal refusal of the executive of the State, to a visiting committee, requesting him to call an extra session of the legislature to pass an apportionment act. What right can the appellee have to invoke the power of this court by injunction, to do what he cannot do directly, namely,

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to coerce the Governor to exercise a discretionary power vested in him? One department of the government cannot coerce another to exercise a mere discretionary power. *Hovey, Gov., v. State, ex rel.*, 127 Ind. 588. He has already refused to act. This suit, therefore, means to end the State government or to coerce the Governor.

The preliminary question confronting us is very different, indeed, from that presented in either of the cases of *Parker v. State, supra*, or *Denney v. State, supra*. In each of those cases the plaintiff, in his complaint, showed that the officers were threatening to proceed under an invalid law, and refusing to proceed under a valid law. Any citizen has a right to demand that public officers shall desist from proceeding under an invalid law, and proceed under a valid law, if there is such valid law, to hold elections. But that is a very different thing from a demand that no election shall be held at all, and that the wheels of government shall stop. Both of the apportionment cases above referred to proceeded upon the idea, and in fact left standing an apportionment act under which elections might be held, in case the other departments of the government failed to supply a better one.

This court, in *Denney v. State, supra*, in the principal opinion by Howard, J., said: "This court, in the case of *Parker v. State*, * * * expressly held that the constitutionality of the * * * act of 1885 was not before the court for adjudication, and accordingly refrained from making any decision in regard to it. Neither has the constitutionality of the apportionment act of 1885 been questioned in the case at bar. Consequently that act is the last, and perhaps the only, expression of the legislative will left upon the subject of apportionment, and under which senators and representatives may be chosen at the general elec-

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tion of 1896, unless the Governor should see fit to call a special session of the legislature to pass a new apportionment law." And in the concurring opinion of Hackney, C. J., it was said: "The act of 1885 stands upon the statute book unchallenged. * * * Whether that act shall continue unquestioned; whether the people will follow the custom in such cases and make their election under that law; or whether that custom will be abandoned, and public officers will refuse to follow it, and thereby defeat the constitutional object to convene an assembly in 1897, depends upon the wisdom and patriotism of the people." These words in both opinions are no idle words. They are full of meaning and relative significance. They are no mere *obiter dicta*. But they express the kernel of the principle that gave the plaintiff in that case a standing in court; entitling him to invoke the power of the judiciary to declare the act of 1895 unconstitutional, and that gave the defendants the right to invoke the same power to declare the act of 1893 unconstitutional. These words show that this court did not mean to accord a hearing to one who invoked its power to strike down the last barrier between the people and helpless and almost hopeless anarchy, as is attempted to be done in this case. That holding was in accord with the holding in *Parker v. State*, *supra*, which was strictly followed in the Denny case. In the Parker case it was said on that point, by Elliott, J., in his dissenting opinion, that: "If, however, it be conceded that it is necessary to decide such questions, and to adjudge either of those acts void, then it is indispensably necessary to designate a valid law, either in the statutes or constitution, under which legislators can be chosen, for it is inconceivable that no law exists providing for legislative elections." With this proposition, the majority of the court did

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not disagree. It will be thus seen that the principle that gave the complainant a standing in each of these cases was, that the relief demanded by him did not strike down all, or the last and only law providing for legislative elections. We are not legally called upon to decide whether the act of 1885 is constitutional or unconstitutional, until the preliminary question first mentioned is decided in favor of the appellee, namely, has he a right to invoke that power vested in the judiciary? It was further said upon this point by Elliott, J., in his concurring opinion in *Parker v. State, supra*, that: "Constitutional questions will not be decided unless the party demanding their decision makes it evident that he has a right to require the court to decide them." To the same effect is *Henderson, Aud., v. State, ex rel.*, 137 Ind. 552.

In *Laughlin v. President, etc.*, 6 Ind., at p. 228, it is said: "Nor ought the process of injunction to be applied but with the utmost caution. It is the strong arm of the court, and to render its operation benign and useful, it should be exercised with great discretion, and only upon necessity." In no case can injunctive relief be awarded except to protect some right of the complainant. *Edwards v. Haverstick, Admr.*, 47 Ind. 138; *Alexander v. Mullen*, 42 Ind. 398; *Sutherland v. Lagro, etc.*, 19 Ind. 192; *McCowan v. Whiteside*, 31 Ind. 235.

The appellee's complaint, instead of showing that he has a right to invoke the power of this court to strike down the last existing apportionment law, shows the direct contrary. That he has the right to invoke the power of this court, if, indeed, it possess that power to knock out the key-stone of the arch that upholds the fair fabric of the State government, is self-evidently untrue. As already observed, the con-

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stitution, as originally adopted, provided, that the previous apportionment law should continue for the first and second legislative elections thereafter. This discloses the intention clearly enough, that there should never be a time when there should be no apportionment law, under which legislative elections might be held. Both the first and second legislatures elected thereafter, failed to obey the mandate of the new constitution to pass an apportionment law. But the third legislature was elected by the people without question under the old apportionment law, which was, by the literal words of the constitution, only to last for the first and second legislative elections under the new constitution; the old law having been framed before the new constitution, and was not framed on the lines prescribed therein for apportionment acts. The third legislature was that of 1857, and it passed the first apportionment act under the new constitution, and though that instrument commanded that body to pass one every six years, yet it failed to pass another for ten years thereafter, the next one being that of 1867. And we note that the Governor also failed to convene the legislature in extra session, if that was his duty, for the purpose of passing an apportionment law on the occasion of each one of the legislative failures above mentioned.

And the legislature has failed on four other occasions to perform this duty, namely, in 1879, 1891, 1893, and in 1895, by passing unconstitutional and void acts. In view of these historical facts, it does not look as if the idea of such failures of duty on the part of the executive and legislative departments of the government were altogether unthinkable.

It is again urged that if we may not respond to the demand of the appellee to investigate the unconstitutionality of the act of 1885, because it is the only one

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in existence, there is no remedy against unconstitutional apportionment acts. Not by any means. We do not mean to depart in the least degree from the rigid rules laid down in *Parker v. State, supra*, and *Denney v. State, supra*, but on the contrary, we affirm them in their broadest terms. When the next apportionment act is passed, we will be free to inquire into its constitutionality, because the act of 1885 will stand until a valid law takes its place. This is the theory upon which the constitution is built.

While the framers of that sacred instrument and the voters who adopted it were all still living, they construed it to mean that the existing apportionment law, whether good or bad, in or out of date, must continue in force until a new one is enacted to take its place; and that the government shall not be brought to an untimely end because of the failure of the legislature to perform the duty enjoined upon it by the constitution. Suppose the third legislative election under the new constitution was about to take place, and that some one, fonder of curiosities and of tinkering with a loaded gun than of the safety of himself and others, had brought suit to enjoin the holding of that election, on the ground that there was no apportionment law, the legislature having failed to enact one, and the one provided in the constitution having expired by the express terms of the constitution; the courts, and especially this court, wherein then sat those who had helped to make the new constitution, would have answered such demand by saying, that it was no more intended by its makers that there should ever come a time, under that instrument, when there should be no law in existence authorizing legislative elections, than that the Creator designed that in Him man should live, move and have his being without breath.

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The just fame of its authors would be greatly marred, if it was contemplated by them that by the failure of any officer, or body of officers, under that constitution to discharge the trust reposed in them by the people, and perform the duty enjoined by its provisions, a time might come when we would have no law in existence authorizing legislative elections, and the people have no security against approaching anarchy, chaos, and revolution, than a mere trust in good luck, or the good will of any man or set of men.

If these great men made such a rope of sand out of the constitution, their fame has been undeserved. But the contrary is true.

They never intended that the people should have no other security against anarchy and revolution than good luck.

Our conclusion is, that as the act of 1885 is the only law that has not been repealed or adjudged unconstitutional, under which an election of members of the legislature can be held in November, 1896, the appellee has no right to invoke the powers of the courts to declare it unconstitutional. And that, therefore, the complaint did not state facts sufficient to constitute a cause of action, and that the superior court erred in overruling the demurrer thereto.

The judgment is reversed, with instructions to sustain the demurrer to the complaint.

SEPARATE OPINION.

JORDAN, J.—I concur in the result reached in this appeal, but not in all the reasoning of the opinion of Judge McCabe. It may be conceded that the apportionment act of 1885 is replete with the evils that were condemned by this court, under the decisions in the cases of *Parker v. State*, 133 Ind. 178, and *Denny v. State*, 144 Ind. 503. I am of the opinion, however,

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that the appellee, who seemingly brought this action in the lower court in behalf of himself and other electors of the State, has not timely exercised the right to assail the validity of the statute in controversy, and for that reason, at least, his case is devoid of equity, and, under the circumstances, he is not in a condition to demand that the court shall interpose and award the extraordinary writ of injunction to prevent the appellants, who are public officers, from doing the acts of which he complains. The statute in dispute ran through an entire sexennial period, during which time it was acquiesced in by the people, and its validity was not challenged in any court, and under its provisions three successive general assemblies were elected by the voters of this State. It is true, that during the time this statute was in active operation, it was criticised and denounced by the public press and upon the stump, yet no attempt was made to assail it in court, during the running of its sexennial period, and thereby secure a judicial determination of its validity. It is a familiar maxim that equity aids the vigilant, and not those who sleep upon their rights. It promotes diligence in a suitor, and punishes his "laches" by denying his request for the relief which he might have obtained had he applied therefor in due season. I fail to recognize anything, under the circumstances, in the case at bar, which will shield the appellee from the force and effect of the salutary rule to which we have referred. As stated heretofore, the great body of the State's electors seem to have accepted this statute, and biennially, for the period of six years, exercised the right to elect representatives and senators thereunder; and now, after the elapse of this period, and at a time when it is conceded by his counsel, that there remains no

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other law under which the next general assembly can be elected, the appellee invokes the judiciary to inquire into the constitutionality of the act in question and grant the extraordinary relief demanded, regardless of the consequences that may follow.

It is manifest, I think, that, under the *status* occupied by the appellee and the circumstances of the case in general, this cannot be done without violating the fundamental principles of equity. It is not apparent that any special beneficial results will inure to the appellee, if the statute in question should be adjudged to be invalid; while upon the other hand, injurious ones might result to the public, hence, under such circumstances, it is evident that equitable rules do not require a court to award the relief requested by the appellee. It is true, as contended by the eminent and learned counsel for the latter, as a general proposition, that courts have nothing to do with the consequences that follow from their decisions; yet, under the state of facts in this cause, the question of the probable results that the public may sustain, if a decision should be adverse to the statute in dispute, becomes a potent factor in deciding whether the relief sought by the action should be granted. Again, it may be said that if under the existing emergency, the Governor declines to convene the present general assembly, in extra session, to enact an apportionment law, and thereby the electors are virtually driven to elect under the act of 1885, members of the house of representatives, and successors to the senators who were elected in 1892, it cannot, in reason, be urged that the courts ought to interpose and forbid them to exercise the right of so doing.

The judgment should be reversed, and the lower court directed to sustain the demurrer to the complaint, for want of equity.

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DISSENTING OPINION.

MONKS, J.—I dissent from both the reasoning and the conclusion reached in the prevailing opinion.

The apportionment act of 1885, tested by the principles established in the cases of *Parker v. State*, 133 Ind. 178, and *Denney v. State*, 144 Ind. 503, where this court held the apportionment acts of 1879, 1891, 1893, and 1895 unconstitutional, is clearly and without doubt unconstitutional and void. It is not a law, and is inoperative for any purpose. It confers no rights; it imposes no duties; it affords no protection, and is the same as if it had never been passed. *Johnson v. Board, etc.*, 140 Ind. 152, on p. 156; *Strong v. Daniels*, 5 Ind. 348; *Sumner v. Beeler*, 50 Ind. 341; *Cooley Const. Lim.* (6 ed.), 222; *Black Const. Law*, 64, section 37.

It is not the judgment of a court that renders a statute unconstitutional, but the fact that it is in conflict with some provision of the constitution. A statute, therefore, that is repugnant to any provision of the constitution is void before, as well as after it is so adjudged. The fact that no court has ever passed upon the question does not render such statute constitutional and valid. Therefore, the apportionment act of 1885 is no more valid and binding than the apportionment acts of 1891, 1893, and 1895, which have been adjudged unconstitutional by this court. This court has uniformly held, that when it clearly appears that a statute is repugnant to or in conflict with any provision of the constitution, it is the plain duty of the courts to declare it null and void. *Campbell v. Dwiggins*, 83 Ind. 473, 480; *Parker v. State, supra*, on p. 187; *Denney v. State, supra*.

Indeed, it is not claimed, in the prevailing opinion, that the apportionment act of 1885 is constitutional;

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but it is not held invalid for the sole reason given, that it is the only statute on that subject, and that if held invalid, the Governor may not call a special session of the general assembly, or, if he does, the general assembly may not enact a constitutional apportionment law, and anarchy may follow.

In response to a suggestion of like character, in *McPherson v. Blacker*, 146 U. S. 1, the court, by Chief Justice Fuller, said:

"It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the State board of canvassers, the legislature in joint convention, and the Governor, or finally Congress * *. The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own." This doctrine was approved by the Supreme Court of New Jersey in *State v. Wrightson* (22 L. R. A. 548), 56 N. J. L. 126.

It is the duty of each department of the State government to act in the discharge of all duties, upon the presumption that the other departments will properly perform all duties incumbent upon them. It is only when the action of the several departments of the State government is governed by this rule that its perpetuity and safety are assured. Any other course tends to bring confusion and anarchy. This court, therefore, should decide all questions properly pre-

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sented, upon the presumption that the executive and legislative departments of the State government will not neglect any duty or fail to perform any function imposed upon them by the constitution. There is much less danger of anarchy by this course than for this court to declare an unconstitutional law valid, or decline to pass upon the question of its constitutionality, for the reason that the other departments named might fail or refuse to perform the duties imposed by the organic law. The suggestion that either the legislative or executive department of the State government might fail or refuse to perform the duties imposed by the constitution as a reason why this court should not adjudge the apportionment act of 1885 unconstitutional, as it clearly is, or as a reason why this court should decline to pass upon that question, is certainly, in the language of Chief Justice Fuller, "inadmissible," and should not be considered by the court; to do so is an unwarranted reflection on the co-ordinate branches of the State government.

In *Parker v. State*, *supra*, decided in December, 1892, before the meeting of the general assembly in January, 1893, this court said: "If, at the next ensuing election, the State is without a valid law, creating senatorial and representative districts under the enumeration of 1889, the responsibility must rest with the legislature, and not the judicial department of the State government."

This same argument was also considered and answered in the apportionment cases decided by the Supreme Courts of Michigan and Wisconsin.

In *Giddings v. Blacker*, 93 Mich. 1 (16 L. R. A. 402), Morse, C. J., said: "We do not care to go further, since there is a remedy in the hands of the executive and Legislature. The consequences of this decision are not for us. It is our duty to declare the law, to

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point out the invasion of the Constitution, and to forbid it."

In *State v. Cunningham*, 81 Wis. 440 (15 L. R. A. 561), Pinney, J., said: "No difficulty, it is believed, need be apprehended as to the result of the decision the court has felt it to be its imperative duty to make; and our respect for the executive of the State, whose duty it is 'to take care that the laws are faithfully executed,' forbids any apprehension that he will fail in the least in meeting the present emergency, or to take such measures as in his wisdom seem best to give full effect to the constitution and the laws."

In the same case, Lyon, J., said: "Neither is the jurisdiction of the court affected, or the exercise thereof embarrassed, by the fact that this decision may leave the State without a valid legislative apportionment law, and hence without any law for the election of another legislature. The Governor may convene the present legislature, if he deems it his duty to do so, and when so convened, there can be no doubt of its power to enact a valid legislative apportionment law."

In the *Legal Tender Cases*, 12 Wall. 457, Mr. Justice Strong, in delivering the opinion of the court, referred to the situation of the country when the acts were passed, and the "great business disarrangement, widespread distress and rank injustice" that would result if said acts were held invalid; but he added, "the consequences of which we have spoken, serious as they are, must be accepted if there is a clear incompatibility between the constitution and the *Legal Tender Acts*."

The proposition that this court should hold an unconstitutional law valid, or refuse to pass upon the question of its validity because some other department of the government might fail or refuse to per-

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form the duties imposed upon it by the organic law, is a dangerous and vicious doctrine, and is not, I think, sustained by reason, and is clearly against the great weight of the authorities.

Neither can I concur in the proposition that the people, having acted upon the apportionment act of 1885, by electing three successive general assemblies under it, that it is now too late to raise the question of its validity. The authorities cited, in support of this doctrine, have reference to actions to enforce private rights concerning property, and can have no application in a case like the one before us. This court, in *Denney v. State*, *supra*, said: "Neither do we think there was any estoppel here, as in the case of *Vickery v. Board, etc.*, 134 Ind. 554, to which we are referred. There the party bringing suit to enjoin levy of taxes to pay for bonds issued on purchase of a toll road, had waited until he received the benefit of the bonds before asking the court to declare unconstitutional the law under which they were issued. Here, while there may be some question of private or personal benefit, yet the issue before the court is much broader. The action concerns all the people of the State in their most enlarged and sacred relations of citizenship, and government, and the case cannot be tied up with the purely private rights of any one. It is true, that an action to test the constitutionality of the law, if brought at all, should have been pressed to a final determination in the first place. * * Yet the people of the State, in their sovereign capacity, cannot, for such reasons, be estopped from asking for the determination of the validity of a law under which it is now proposed they shall elect their next legislature. When the people of the State appear at this bar with such an issue, there can be no question of estoppel.

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The inquiry is one reaching to the foundations of the government."

In *Parker v. State, supra*, this court held that the apportionment act of 1879 was unconstitutional, notwithstanding three successive general assemblies had been elected thereunder, and more than thirteen years had elapsed since its enactment. Yet it has only been eleven years since the apportionment act of 1885 was passed. Lapse of time, however, cannot, in a case like the one at bar, render an unconstitutional statute valid or secure from attack, or deprive the people of their right to question its validity. We think the correct doctrine was declared in *State v. Wrightson, supra*, on p. 208, quoting the language of Judge Cooley: "*Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it.*"

The subject of acquiescence in unconstitutional apportionment statutes, as affecting the right of an elector to have the validity of the act determined, was considered by the Supreme Court of New Jersey in *State v. Wrightson, supra*, where it was claimed that a particular method of apportionment had been acquiesced in ever since the adoption of the constitution by all parts of the State government and by the people, and that therefore it was no longer subject to question. But it was held by the court that this doctrine had no application whatever in a case where it appeared that mandates of the constitution had not been obeyed. The court said: "The constitution contains the permanent will of the people. It is paramount to the power of the legislature, and can be revoked or altered only by the power which created it. Popular government can be maintained only by upholding the constitution at all times and on all oc-

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casions as it was when it came from the hands of the people, by whose fiat it was established as the fundamental articles of government, to abide until altered by the authority which created it. To adopt the language of Chief Justice Bronson, in *Oakley v. Aspinwall*, 3 N. Y. 568: 'There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided, or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. * * * One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them.'

"Within the domain of construction there is room for argument and discussion—nay, even for a diversity of opinion; but when the meaning of the constitution, interpreted by its letter and in its spirit, is ascertained, extraneous considerations are of no avail. In the process of construction, long usage and practical interpretation are entitled to great weight if the language be obscure or doubtful; but such extraneous considerations cannot be allowed 'to abrogate the text' or 'fritter away its obvious sense.'

"I have already said that, on a construction of the words of the constitutional provision regulating this subject, fortified by the policy and institutions which prevailed in this State prior to the framing of the constitution, and a comparison of other of its provisions, the constitutional mandate requires the election of members of the general assembly by the legal voters

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of the counties respectively, and that the division of counties into assembly districts and the distribution of the members among these districts for the purpose of electing such members is in conflict with the constitutional mandate. No one can examine the legislation on this subject from 1871 to the present time and contemplate the results without realizing the evils which have been fostered under this system. Relief from these wrongs through the ballot box cannot be assured, the majority in the legislature being elected under this system by a minority of the legal voters of the State. Precedent has been followed by retaliation, to be repeated from time to time as supremacy in the legislature has passed from one political party to the other. For this condition of affairs the only remedy is by a return to constitutional methods."

It is said in *Cooley Const. Lim.*, 87, note, in criticising the action of certain courts in declaring a statute to be constitutional which was not: "But it would have been interesting and useful if either of these learned courts had enumerated the evils that must be placed in the opposite scale when the question is whether a constitutional rule shall be disregarded; not the least of which is, the encouragement of a disposition on the part of legislative bodies to set aside constitutional restrictions, in the belief that, if the unconstitutional law can once be put in force, and large interests enlisted under it, the courts will not venture to declare it void, but will submit to the usurpation, no matter how gross and daring. We agree with the Supreme Court of Indiana, that, in construing constitutions, courts have nothing to do with the argument of *ab inconvenienti*, and should not 'bend the Constitution to suit the law of the hour.' *Greencastle Tp. v.*

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Black, 5 Ind. 557, 565; and with *Bronson*, Ch. J., in what he says in *Oakley v. Aspinwall*, *supra*."

It is now more than five months until the next general election, and ample time remains for the proper authorities to take such steps as may be deemed necessary to protect the rights of the people, and see "that the laws are faithfully executed."

If, however, the election were so near at hand that such steps could not reasonably be taken, the court might, perhaps, properly withhold its decision until after the election was held; but in no event would the court be justified in adjudging that an unconstitutional apportionment act was valid, or, in refusing to pass upon the question of its validity; to do so is to disregard the provisions of the constitution, which every officer is sworn to support.

It is proper to say that the quotation made in the prevailing opinion, from the separate opinion of Elliott, J., in *Parker v. State*, *supra*, is from that part of the opinion in which he expresses his dissent from the action of the majority in declaring the apportionment act of 1891 unconstitutional, and that the language quoted gives one of the reasons he urged why the court should not pass upon the question.

The majority of the court, however, passed upon the question, and held said act unconstitutional.

The judgment should be affirmed.

TEEGARDEN ET UX. v. LEWIS, ADMINISTRATOR.

[No. 16,698. Filed June 4, 1895. Rehearing denied May 15, 1896.]

GIFT.—*Special Verdict*.—*Mental Capacity of Donor*.—*Practice*.—On the issue as to whether a donor had sufficient mental capacity to make a valid gift *inter vivos*, a finding in a special verdict that the

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145	98
149	99
150	101
150	106
151	384
145	98
153	634
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150	509
145	98
151	662
145	98
153	442
145	98
150	35
157	119

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169	156
170	78

donor was of unsound mind, is a mere conclusion of law and not such a statement of facts as that the court could apply the proper legal conclusions and render judgment. *p. 99.*

SAME.—*Unsoundness of Mind.—Burden of Proof.*—One who challenges the mental capacity of a testator, or donor, has the burden of establishing the absence of the particular capacity in issue. *p. 102.*

PRACTICE.—*Fiduciary.—Burden of Proof.*—One occupying a fiduciary relation must, when the question is made, establish his right in equity and good conscience to any advantage gained by him from or through his principal, or his principal's business. *p. 112.*

SAME.—*Parent and Child.—Presumption of Fraud.—Onus of Proof.*—The relation of parent and child, as to presumption of fraud and the *onus* of proof to rebut the same, in business transactions between them, does not stand upon the same footing as the relation of trustee and *cestui que trust*, guardian and ward and the like relations. *p. 116.*

From the Parke Circuit Court. *Affirmed in part and Reversed in part.*

Rice & Johnson, and *McCabe & Bingham*, for appellants.

W. T. Whittington, and *Kennedy & Kennedy*, for appellee.

HACKNEY, J.—The question for decision in this case arises upon a special verdict, and involves the right of the appellants to retain, as against the appellee, moneys held by them as gifts from the appellee's intestate.

It was found that the appellants, jointly, had received \$4,774.00, and that said John R. Teegarden had received to his separate use \$4,093.00. In each instance, where it is found that the appellants received money from the intestate, it is also found that the intestate "was of unsound mind." For the appellants, it is insisted that the special verdict, in finding that the intestate "was of unsound mind," stated a conclusion of law, or of mixed law and facts, and failed to state the ultimate facts, upon which the court could apply the proper legal conclusions and render judg-

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ment. For the appellee, it is contended that the finding quoted is a finding of the ultimate facts only. There is little, if any, room to doubt that if the intestate did not possess mental capacity sufficient either to execute a valid will or a valid contract, the gifts were voidable and the appellants must be held to have received the moneys to the use and benefit of the intestate, and that it may be recovered by the appellee. *Jenners v. Howard, Admr.*, 6 Blackf. 240; *McQueen v. Bank*, 2 Ind. 413; *Ferguson v. Dunn's Admr.*, 28 Ind. 58; *Musselman v. Cravens*, 47 Ind. 1; *McFadden v. Wilson*, 96 Ind. 253; *Moore v. Shields*, 121 Ind. 267; *Bullard v. Hascall*, 25 Mich. 132; *Mason v. Waite*, 17 Mass. 560.

Some authorities hold that the test of mental capacity to be applied to a completed gift is the same as that to be applied to any other contract, and not that of testamentary capacity. 2 Schouler Per. Prop., sections 59, 141; 8 Am. and Eng. Ency. of Law, 1309. The reason given for this rule is that there are necessarily two parties, and the transaction involves the assent of two minds, while in the execution of a will there is but one active party, with opportunity for reflection apart from the beneficiary and free from his influences. A gift *inter vivos* differs from a bestowal by will, only as it does from gifts *causa mortis*, it is not made in contemplation of or to be effective upon the death of the donor. If inducements or influences, from the donee, to make the gift, should be considered in determining the test of mental capacity, we are unable to discern why the same inducements and influences might not obtain in the execution of a will as of a gift. Either is like the other, in that the donor receives no recompense or equivalent for that which he gives. We do not deny that when completed, the effects of the gift are the same as if the object had been

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parted with by contract. Yet the effect is no less so when possession is reached through the provisions of a will. Why the standard of intellect in either should be higher than the other, has not been demonstrated. With deference to the authorities cited, it is our judgment that the capacity to execute a will is the perfect requisite for the execution of a gift *inter vivos*.

However, we may test the present verdict by either rule and the same results must be reached, as we view the question. The mental requisites for the support of ordinary contracts have not been so frequently or so clearly defined as those for the execution of testamentary provisions, yet there is an undoubted distinction which has been recognized by the holdings in this State. In ordinary contracts the test is, were the mental faculties so deficient or impaired that there was not sufficient power to comprehend the subject of the contract, its nature and its probable consequences, and to act with discretion in relation thereto, or with relation to the ordinary affairs of life. *Somers v. Pumphrey*, 24 Ind. 231; *Darnell v. Rowland*, 30 Ind. 342; *Dennett v. Dennett*, Ewell's Lead. Cas. 547 N. 558, and Clark Cont. p. 263.

Testamentary capacity is determined upon the inquiry: Did the testator possess sufficient strength of mind and memory to know the extent and value of his property, the number and names of those who were the natural objects of his bounty, their deserts with reference to their conduct and treatment towards him, their capacity and necessity, and did he have sufficient active memory to retain all these facts in mind long enough to have his will prepared and executed? *Burkhart v. Gladdish*, 123 Ind. 337; *Harrison v. Bishop*, 131 Ind. 161; *Fiscus v. Turner*, 125 Ind. 46; *Lowder v. Lowder*, 58 Ind. 538.

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We do not so much seek to ascertain the existing distinction and to define it, as to establish the conclusion that mental capacity is susceptible of ascertainment and expression as a fact, unembarrassed by legal conclusions. Whatever the test, we think it clear that its existence, or non-existence, may be found and stated as a question of fact. That special verdicts should find the facts, and should not state conclusions of law, is not doubted or questioned, but the contention here, as we have said, is as to whether the finding that the intestate "was of unsound mind" is a statement of fact, or involves a conclusion of law, and invades the province of the court. Our statute, R. S. 1894, section 2726 (R. S. 1881, section 2556), withholds from persons of unsound mind the power to make a testamentary disposition of property, while it is provided by section 2724, R. S. 1894 (section 2554, R. S. 1881), that "Every contract, sale or conveyance, of any person while of unsound mind, shall be void." By judicial construction, the latter section has been held to mean that such contracts shall be void, if executed by those adjudged to be of unsound mind, and voidable only, if executed by those who are unsound but not so adjudged. *Boyer v. Berryman*, 123 Ind. 451; *Copenrath v. Kienby*, 83 Ind. 18; *Fay v. Burditt*, 81 Ind. 433; *McClain, Gdn., v. Davis*, 77 Ind. 419; *Freed v. Brown*, 55 Ind. 310; *Nichol v. Thomas*, 53 Ind. 42; *Somers v. Pumphrey, supra*; *Musselman v. Cravens, supra*; *Redden v. Baker, Gdn.*, 86 Ind. 191; *Davis v. Scott*, 34 Ind. 67.

By section 2714, R. S. 1894 (section 2544, R. S. 1881), the phrase "unsound mind," it is declared, "shall be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person." Yet, it has been settled that one who is of unsound mind, suffering from delusions or being a monomaniac, may make a valid

contract or a will, if such malady do not enter into or control, to some extent, the execution thereof. *Wray v. Wray*, 32 Ind. 126; *Durham v. Smith*, 120 Ind. 463; *Burkhart v. Gladdish*, *supra*; *Harrison v. Bishop*, *supra*; *Lowder v. Lowder*, *supra*; *Kenworthy v. Williams*, 5 Ind. 375; Clark Cont., p. 266.

In *Wray v. Wray*, *supra*, the lower court instructed the jury that "it is not necessary to prove the grantor totally insane, that is, of unsound mind as to all subjects; a man may be sane upon some subjects, and of unsound mind upon others. He may be sane upon all other subjects, and yet afflicted with a delusion upon one which would amount to insanity as to that one." This court said of that instruction: "One who seeks to set aside a contract on the ground of insanity must show that it was the offspring of mental disease," and held the instruction to have been correct.

In *Durham v. Smith*, *supra*, an instruction was as follows: "Furthermore, I instruct you that a person who is of unsound mind is incapable of making a valid will, and if there is unsoundness of mind, it is not necessary for the contestant to show that such unsoundness had anything to do with the manner of disposing of the property. In such a case the will is invalid, whether it is shown that the unsoundness of mind had, or had not, affected the character of the testament." The instruction was condemned, upon the last proposition therein stated, and it was held that the words "unsound mind," used in the instruction, were used "in their broadest sense, including every species of defectiveness and impairment of the mind." It was said, further, of the instruction: "In short, this charge recognizes but two conditions of the human mind, one sound and capable of doing all acts, and the other unsound and incapable of doing any act; that a person is responsible for all his acts, or not re-

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sponsible for any of his acts. This is an erroneous theory of the law. *Trumbull v. Gibbons*, 51 Am. Dec. 253; *Clark v. Fisher*, 19 Am. Dec. 402; *Jackson v. King*, 15 Am. Dec. 354, and note. 363."

Some of the cases speak of that defective or impaired condition of mind, which will not avoid a will or contract, as partial unsoundness of mind. Such partial unsoundness of mind, as recognized by the law and as stated in the cases we have cited, if it enter into and control the execution of the will or contract so that the will or the contract may be said to be the offspring of such imperfect or impaired condition, will be held, under the statutes quoted above, to invalidate such will or contract. In other words, partial insanity is an unsoundness of mind which is within the statutory declaration, if it controls the execution of the contract against the rational will and judgment of the party. If it do not so control, while nevertheless the condition is that of unsound mind, the instrument or act is valid. We are lead, therefore, to the conclusion that the jury might, under the evidence, have returned the finding they did, and with good faith and accurate judgment have found the intestate to have possessed testamentary capacity, or the ability to make a valid contract upon the tests we have stated. Such a conclusion is made possible by the rule that unsoundness of mind may exist, and yet not affect the testament or the contract. If we should consider the question with no other lights before us, it would be seen that such a verdict leaves the court, whose exclusive office it is to pronounce judgment, in darkness as to whether the unsoundness of mind found, is that which enforces the legal conclusion that the transaction in question is valid or voidable. We have no doubt, however, that the ultimate fact is not stated in the verdict. If it had been returned, that the

intestate, at the times in question, was so impaired in mind that he could not act with discretion in relation to the ordinary affairs of life; or that from such impairment, he had not the power to comprehend the subject of the contract, its nature and probable consequences, and to act with discretion in relation thereto; or that he was unable to know the extent and value of his property, the number and names of those who were the natural objects of his bounty, their deserts with reference to their conduct and treatment towards him, their capacity and necessity, and had not sufficient active memory to retain such facts in mind long enough to have a will prepared and executed, we would then have a statement of the ultimate facts. Upon such a finding, the courts could apply the law and direct a judgment.

That the facts indicated are such as should be returned, is we think, very clearly illustrated by applying the rule necessarily adopted by the trial court in its charge to the jury, in a case where a general verdict is to be returned. There the court would group one or more such sets of facts and direct the jury that, in the event of the evidence establishing such facts, it would be their duty to return a verdict in favor of the party asserting the unsoundness of mind. That such facts are not merely evidentiary, is made plain by rule that the court would not be permitted to apply the evidence for the jury, in delivering instructions. It is made plain, from the further rule, that a witness could not be permitted to state, as evidence, any one of the facts so suggested. The witness might give instances from his observations of the person whose mind was in question, and he might be permitted to state his opinion, as an expert or as a non-expert, upon the soundness or unsoundness of such mind, but, in that event, the jury would be the judge

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of the degree of unsoundness. *Hamrick v. State, ex rel.*, 134 Ind. 324. If a general verdict were pronounced, it would be upon finding the degree of unsoundness and applying the law as charged, concerning the degree essential to the validity of the instrument. If a special verdict were required, the degree of unsoundness only would be returned, and the court would apply the rules, otherwise charged to the jury, and determine whether such degree of unsoundness was within the measure of the law, which required the contract or will to be set aside.

In the case of *Perkins v. Hayward*, 124 Ind. 445, was laid down a rule for determining when the return is a conclusion or the statement of an ultimate fact. When it is not possible to do more than state the conclusion, without violating the rule forbidding the statement of evidentiary facts, such conclusion may be stated as of necessity. When there is no standard by which it may be determined, as a pure matter of law, what facts will establish the issue, the inferential fact or conclusion is necessary to come from the jury.

In *Todd v. Fenton*, 66 Ind. 25, a will was contested upon the issues of unsoundness of mind, undue execution, duress, fraud, and undue influence. The court refused interrogatories asked by the defendants and substituted the following, the answers to which we copy:

"Was Elizabeth Todd of sound mind, at the date of the execution of the paper writing in contest, namely, on the 19th day of July, 1869?

"Ans. She was of unsound mind.

"2. Was the paper writing duly executed?

"Ans. It was duly executed.

"3. Was Elizabeth Todd under duress, at the time she signed the paper writing?

"Ans. She was not.

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"4. Was said paper writing procured to be made by said Elizabeth Todd, by fraud?

"Ans. It was.

"5. Was the paper writing procured to be made by Elizabeth Todd, by undue influence? If so, by whom?

"Ans. It was; by Joseph Todd and I. N. Todd."

The court said of the interrogatories: "They were no more particular than if the court had directed the jury to say whether they found for the plaintiff or the defendants, on each of the several grounds of contest * * *. To state the matter a little differently, the effect of the interrogatories was simply to require the jury to specify whether or not each of the several grounds of contest was made out." It was held that such interrogatories and answers were not findings, "upon particular questions of fact to be stated in writing," as the statute required. One of the rejected interrogatories, which this court held should have been given, was as follows: "At the time said Elizabeth Todd signed said will, did she have mind and memory sufficient to understand the ordinary affairs of life, and to act with discretion therein? Did she know her children and grandchildren, and have a general knowledge of the estate of which she was possessed?" This court said of the interrogatory: "It was directed to matters of fact concerning which evidence had been given, and not to matters of evidence," and it was held that such facts were the proper subjects of inquiry. So we may say in the present case, that to find that the intestate was of unsound mind is not only, in effect, but a general verdict, but deprives the court of its prerogative and denies its right to pass upon the legal sufficiency of the facts. It has been held, in numerous cases, that the *quantum* of mental capacity requisite to the performance of a valid act

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is a mixed question of law and fact. *Farrell's Admr. v. Brennan's Admx.*, 32 Mo. 328; *Runyan v. Price*, 15 Ohio St. 1; *DeWitt v. Barley*, 17 N. Y. 340; *Gibson v. Gibson*, 9 Yerg. 329; *Henerick v. State, etc.*, *supra*; *Buswell Insanity*, 174.

Without decisions this question is so manifest as to admit of no doubt. It is therefore not for the jury to return the legal conclusion in a special verdict, and it has performed its whole duty in returning the facts whereon the court may pronounce the law.

That a complaint may be sufficient which alleges unsoundness of mind generally, is not at variance with our conclusion, has been held in cases of negligence, conversion, former adjudication, etc. *Conner v. Citizens' etc., R. W. Co.*, 105 Ind. 62; *Pittsburg, etc., R. W. Co. v. Spencer*, 98 Ind. 186; *Louisville, etc., R. W. Co. v. Balch*, 105 Ind. 93; *Nickless v. Pearson*, 126 Ind. 477.

There are other questions in the record as to the burden of proof and the form of the judgment, but these will probably not again arise.

In our judgment, the ends of justice will be best subserved by a new trial of the issue between the parties, rather than by ordering judgment on the special verdict. For the error above found, the judgment of the circuit court is reversed, with instructions to grant the appellants' motion for a *venire de novo*.

MCCABE, J., did not participate in this case.

ON PETITION FOR REHEARING.

HACKNEY, C. J.—Counsel for the appellee again insist that the finding that Deer was, at the times in question, of "unsound mind," was a finding of fact, and not a conclusion.

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We have carefully considered the argument made, and are constrained to adhere to our original holding upon that question. It is urged, also, that when insanity was found, the burden rested upon the appellants to prove that it did not affect the gift, and that since the special verdict omits a finding that such proof was made, the failure in this respect will be deemed the failure of the appellants. This position, at one time, had apparent support from the decisions of this court, but at this time the rule deemed to be just and to be best supported by authority, is that one who challenges the mental capacity of a testator or donor, has the burden of establishing the absence of the particular capacity in issue. *Blough v. Parry*, 144 Ind. 463.

There were three paragraphs in the complaint. The first sought to recover for moneys had and received by the appellants to the use of the decedent, Urial Deer. The second alleged, that Deer was of unsound mind; that the appellants had taken charge of his affairs and had collected large sums of money from divers persons and banks for him, and which they concealed and appropriated to their own use. The third paragraph alleged, that Deer was aged and infirm; that he lived with the appellants, his daughter and son-in-law, and was easily controlled and influenced by them; and that they "unduly importuned, persuaded, and influenced said decedent to turn over to them all his money which he then had in his possession, amounting," etc., "which said decedent gave into their possession under the influence of such undue persuasion and importunity," and they have retained the same and refuse to account therefor.

The theory of each paragraph is manifest. By the first, regardless of the mental capacity of Deer, the appellants are charged with money had and received to his use. By the second, with money belonging to

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him and obtained by them from his debtors while he was of unsound mind and incapable of consenting to their possession of such money. By the third, the obtaining of his money by undue influence. The jury found, as relating to these several paragraphs, that "Urial Deer had been a person of unsound mind continuously for two years prior to his death, and that in January 1888, the defendants, John R. Teegarden and Hulda Teegarden, his wife, received from said Deer, as a gift, while he was of unsound mind, the sum of \$3,850.00, which they yet hold and refuse to pay to plaintiff as administrator," etc. "And further find, that afterwards, and while said Deer was of unsound mind, John R. Teegarden, as agent of Deer, received from," a bank named, "\$3,400.00, which sum he wrongfully appropriated to his own use before the commencement of this suit," etc. "4. We further find that from August, 1887, to the 22d day of August, 1889, the time of Urial Deer's death, he was old, weak, and childish, and relied upon John R. Teegarden to go with him and assist him in transacting all of his financial business; that during all of said period said Deer lived with said John R. Teegarden and the wife of said Teegarden, who was the daughter of said Urial Deer, and that said Deer, during all of said period, was dependent upon said Teegarden and his (Teegarden's) wife for personal care and attention, and a home to live in, and that all of the money hereinbefore found to have been procured from said Deer by them, or given to them by said Deer, has remained in their possession, as hereinbefore found, and that said defendants have not shown that they rightfully received said money from said Urial Deer, and we find that they wrongfully converted all of said money to their own use before the commencement of this suit."

Upon demand, John R. Teegarden denied having

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"in his possession any of the personal property of Urial Deer." It was found, also, that when John R. Teegarden obtained said \$3,400.00 from said bank, Deer was indebted in a sum stated, and "said \$3,400.00 was all the property of any kind that he owned or possessed," at the time of its conversion, except the claims in this suit. The jury made a further finding, that if the law should be with the appellee, he should recover against John R. Teegarden \$4,063.00, and against John R. and Hulda Teegarden \$4,774.00. The judgment of the court was against the appellants jointly for \$4,774.00, and against John R. Teegarden for \$4,063.00.

Upon the conclusion reached, in the original opinion, neither of these sums was recoverable under the second paragraph of complaint, and the verdict for all purposes should be treated as not containing the findings that Urial Deer was of "unsound mind." The findings, that the appellants converted said sums to their own use, were conclusions, and had no proper place in the verdict. *Louisville, etc., R. R. Co. v. Balch*, 105 Ind. 93.

With relation to the findings as to the \$3,400.00, we think it appears, with reasonable certainty, that it was the property of Deer; that it was, as such, obtained by John R. Teegarden and retained by him. This, we think, is true, whether we regard the finding of an agency as a conclusion or the statement of a fact. The finding, in this respect, is supportable upon the first paragraph of complaint.

With relation to the finding as to the \$3,850.00, they can have no support upon the theory of the first or the second paragraph of complaint, if we are correct in our holding as to the effect of the general finding, that Deer was of unsound mind; and it remains to be determined whether they can be maintained upon the third

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paragraph of complaint. As to that sum, the finding is that it was a gift to the appellants, and there is no finding of positive fraud or undue influence. The parties treat the question, as to this sum, with reference to the doctrine of constructive fraud arising from the situation of confidence and dependence on the one side, and advantage on the other side, and we have no doubt it must be disposed of upon that doctrine upon any view of the findings.

The jury seem to have accepted the theory that the burden rested upon the appellants to show that this money was rightfully received by them, and this theory presents the most important element of the present controversy. There can be no doubt of the general rule, that one occupying a fiduciary relation must, when the question is made, establish his right in equity and good conscience to any advantage gained by him from or through his principal, or his principal's business. 8 Am. and Eng. Ency. of Law, p. 847; Pomeroy Eq. Jur., section 956; Bigelow Frauds, p. 278; Tiedman Eq. Jur., section 235; Beach Modern Eq. Jur., section 141. This duty most frequently arises where the relations between the parties are those of attorney and client; principal and agent; trustee and *cestui que trust*; guardian and ward, and the like. But, there can be no doubt, that the sound rule applies, when, from the superiority of one side and the weakness, partial incapacity or dependence of the other, a substantial and apparently unconscionable advantage has been gained. *Ewing v. Wilson*, 132 Ind. 223; *Ikerd v. Beavers*, 106 Ind. 483; *McCormick v. Malin*, 5 Blackf. 509, and authorities cited; *Woodbury v. Woodbury*, 141 Mass. 329, S. C. 55 Am. Rep. 479; *Ashmead v. Reynolds*, 134 Ind. 139; *Jacox v. Jacox*, 40 Mich. 473; *Highberger v. Stiffler*, 21 Md. 338; *Crawford v. Hoeft*, 58 Mich. 1; *Barnard v. Gantz*, 140 N.

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Y. 249; *Martin v. Martin*, 57 Tenn. 644; *Street v. Goss*, 62 Mo. 226; *Hill v. Miller*, 50 Kan. 659; *Paddock v. Pulsifer*, 43 Kan. 718; *Mott v. Mott*, 49 N. J. Eq. 192; *Muzzy v. Tompkinson*, 2 Wash. 616; *Fitch v. Reiser*, 79 Ia. 34; *Moore v. Moore*, 81 Cal. 195; *Boisaubin v. Boisaubin*, 27 Atl. Rep. 624; *Green v. Roworth*, 113 N. Y. 462; *Allore v. Jewel*, 94 U. S 506.

By the findings, as to the sum now in question, Deer, while he was "old, weak, and childish," while he made his home with the appellants, and depended upon them for such home and for personal care and attention, and while he depended upon Teegarden "to go with him and assist him in transacting all of his financial business," he made to said Teegarden and his son-in-law and daughter, a gift of \$3,850.00.

There is no finding that he was subject to, or easily influenced by their persuasion; there is no finding that they exercised any persuasion to obtain the gift, nor does it appear, that at the time of making it, he had no other property, nor that he, by making it, dealt unjustly or with inequality with his other children.

The naked question is: Will the relationship existing, together with Deer's infirmities, enforce the presumption of undue influence and cast the burden upon the appellants of showing the absence of such influence?

Counsel for the appellants urge a distinction between the cases, where the ordinary fiduciary relation exists and those where the relation is that of parent and child. That such distinction has recognition in many of the authorities, is without doubt. However, many of the cases cited, last above, involve transactions between parent and child, and the distinction suggested was neither considered nor observed, but the ordinary rule was applied.

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In Pomeroy Eq. Jur., vol. 2, section 962, in a chapter upon the subject of constructive fraud, and following a discussion of the rules with reference to advantages gained from the ordinary fiduciary relation, it is said: "Where the parent is aged, infirm, or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority, conveyances conferring benefit upon the child may be set aside. Cases of this kind plainly turn upon the exercise of actual undue influence, and not upon any presumption of invalidity; a gift from a parent to a child is certainly not presumed to be invalid."

In Bigelow on the Law of Fraud, vol. 1, p. 357, under the head of constructive fraud, and after discussing the question of conveyances and gifts by children to parents, where the parental influence may operate upon the hopes or fears of the child, it is said: "The influence which a child may exert over a parent on the other hand, by acts of filial duty and obedience, can never be undue influence. That influence is proper which any person gains over another by acts of pure kindness and attention and by correct conduct. In the case of a gift from a child to a parent, undue influence may be inferred from the relation itself, but never where the gift is from the parent to the child. * * * A parent does not yield obedience to the child further than affection or duty prompts; and it is in accordance with the promptings of nature that parents should make gifts to their children."

In *Beanland v. Bradley*, 2 Smale & G. 339, it is said: "There is no rule of this court which prohibits a man, by voluntary deed, from bestowing a benefit upon his son, or his grandson, or his son-in-law, even though only a few days before his death. To provide for his children or grandchildren is, or may be, a necessary duty; and where a father discharges that duty, this

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court will not presume fraud. If fraud is alleged, it must be proven in the ordinary way."

In *Wessell v. Rathjohn*, 89 N. C. 377, S. C. 45 Am. Rep. 696, a father was in a condition, arising from debility, to make him easily subject to importunity and undue influence, and his child occupied a position affording an opportunity to exercise such influence. In this condition, the father made a deed of conveyance to the child. It was held that undue influence would not be presumed, and in the course of the opinion it was said: "The facts stated are not inconsistent with the entire integrity of the deed, that is, the facts may be true, as stated, and the deed may have been executed in good faith and without the slightest improper act or conduct on the part of the grantee. The facts stated are evidence, not amounting to a presumption, to go to the jury upon a question of *mala fides* when raised. It is not strange or unnatural that a father, feeble in health, of weak mind, and easily influenced by a daughter having opportunity to exercise such influence, should give his daughter a house and lot and execute to her a deed for it. It is natural, that the father should provide for his daughter; this is a proper and orderly thing to be done. It is what the paternal feeling of good men prompts them to do; it is what just men commend and the law tolerates. Why should the law cast suspicion upon such a transaction? When the transaction, the deed, is right in itself, such as the law tolerates and the common sense of men approves as just, reasonable and commendable, and there is the absence of the relations of suspicion founded on motives of policy, no adverse presumption arises; on the contrary, the law presumes such deed or transaction in all respects proper and just until the contrary is made to appear. The burden is on him who alleges the contrary to

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prove it. * * * * The relation of parent and child, as to presumption of fraud and the *onus* of proof to rebut the same, in business transactions between them, does not stand upon the same footing as the relation of trustee and *cestui que trust*, guardian and ward, attorney and client, principal and agent, and the like relations; it belongs to a different class of fiduciary relations, in which the presumption is not so strong, nor does it arise under the same circumstances. Besides, the presumption is always against the party having the superior dominant position or control, and this, in the case of parent and child, is that of parent." See also *Jackson v. King*, 4 Cowen 207, S. C. 15 Am. Dec. 354; *Saufley v. Jackson*, 16 Tex. 579. *Howe v. Howe*, 99 Mass. 88; *Wray v. Wray*, 32 Ind. 126.

In *Saufley v. Jackson*, *supra*, in speaking of the rule where the ordinary fiduciary relation has been abused, it was said "But it is clear that this rule was never applied, neither unqualified or qualified, to a deed or gift from a parent to a child; and the reverse of such principle has always been sustained; and there is not believed to be a single exception to the principle that a deed from a parent to a child is always regarded with a favorable eye, and every presumption is in favor of its validity."

In our opinion, the distinction contended for must rule the present inquiry. As to Mrs. Teegarden, that she was a daughter who discharged a moral obligation of supplying a home to and caring for the personal needs of her father, who was aged, weak, and childish, is all that can be urged to raise the presumption of undue influence on her part. In addition to a like discharge of obligation, John R. Teegarden went with and assisted Mr. Deer in transacting his financial business.

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If the assistance of John R. Teegarden in the business affairs of Mr. Deer raised the fiduciary relation covered by the general rule, it is difficult to see how that fact could taint the gift as to Mrs. Teegarden. But, we apprehend, that more must appear as to both of the appellants. So far as the element of imbecility is concerned, the facts found are hardly sufficient to warrant the conclusion that Deer was an easy prey to the influences of either of the appellants, and there is an absence of any fact authorizing the inference that either of them sought the gift. If there is any strength in the exception to the general rule, it is indispensable that some element of positive fraud shall be found. The conduct of the appellants, with reference to the gift, so far as the facts appear, is not only not objectionable, but it is highly commendable, save only, possibly, in receiving the gift from one mentally weak. Mental weakness alone is not claimed to be sufficient to avoid the gift. Neither the weakness of Deer nor the control of his affairs, as found, can authorize the conclusion that he was under the superior control or equitable guardianship of the appellants. Unless it can be said that he was in a situation that their will could probably be substituted for his, there can be no constructive fraud.

Our cases of *McCormick v. Molin*, *supra*; *Ewing v. Wilson*, *supra*; *Ikerd v. Beavers*, *supra*, and *Ashmead v. Reynolds*, *supra*, each involves some element of positive fraud, and in any of these cases the relationship existing between the parties differed from that here existing, in that no moral obligation rested upon the party parting with his property or extending the obligation to the party to be benefited, excepting in the case of *Ewing v. Wilson*, *supra*, and there the deed was from son to father.

The petition for a rehearing is overruled, and the

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mandate heretofore entered is, by the court, modified so that the judgment of the circuit court, as against John R. Teegarden alone, is affirmed, and the judgment against John R. Teegarden and Hulda Teegarden jointly is reversed.

DISSENTING OPINION.

HOWARD, C. J.—I do not think that it was necessary for the jury, in addition to finding that the decedent was of unsound mind, to find anything further on this issue.

When a person has been found to be of unsound mind, the law infers that he is incapable of transacting business. Section 2724, R. S. 1894 (2554, R. S. 1881), provides that every contract, sale or conveyance of any person while of unsound mind shall be void; and section 2726, R. S. 1894 (section 2556, R. S. 1881), of the same statute, excepts persons of unsound mind from those who may make a valid will. And if a person of unsound mind cannot enter into a valid contract, or make a valid will, it is very clear that he cannot make a valid gift. See *Willett v. Porter*, 42 Ind. 250; *Schuff v. Ransom*, 79 Ind. 458; *Riggs, Admr., v. American, etc., Society*, 84 N. Y. 330.

In *Fiscus v. Turner*, 125 Ind. 46, an instruction was approved, in which the jury were told, that if a person was so far deprived of reason that he was no longer capable of understanding and acting with discretion in the ordinary affairs of life, he was insane within the meaning of the law. In other words, that want of capacity to act with discretion in the ordinary affairs of life, is evidence of unsoundness of mind; that unsoundness of mind and an incapacity for the transaction of business are correlative, each implies the other. Unsoundness of mind like drunkenness, is a fact to be found from the evidence.

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The complaint and the finding, in this particular case, very closely follow the statute. Sections 2715, 2716, R. S. 1894 (2545 and 2546, R. S. 1881). The statement or complaint required by the statute to be made, is, "that any inhabitant of such county is a person of unsound mind and incapable of managing his own estate." A guardian is to be appointed, "if such jury shall find that such inhabitant is a person of unsound mind." The finding of unsoundness of mind simply, is sufficiently responsive to the complaint.

Believing that the verdict was sufficient, I must dissent from the conclusion reached by the court.

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145	119
147	637

[No. 17,169. Filed February 21, 1896. Rehearing denied May 18, 1896.]

PRACTICE.—*Criminal Procedure.*—*Discharge of Juror After Submission.*—After the acceptance of the jury, and after they are sworn to try the cause, it is too late to examine them as to their competency, or to peremptorily challenge any of their members, unless there be first interposed a motion to set aside the submission.

From the Vanderburgh Circuit Court. *Affirmed.*

P. W. Frey and *W. W. Ireland*, for appellant.

W. A. Ketcham, Attorney-General, and *J. W. Spencer*, *J. R. Brill*, and *F. E. Matson*, for State.

HOWARD, J.—The appellant was convicted of murder in the first degree, and sentenced to the State's prison for life.

It is admitted by the State, that appellant was greatly wronged by the deceased, both in his domestic relations and also in the abusive language used by the deceased and in the threats used by him against the life of the appellant. From a purely legal stand-

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point, however, there is abundant direct evidence which supports the verdict; and there was no element of self-defense.

The error insisted upon by the appellant is that the court overruled his motion to discharge one of the jurors from the panel trying the case, both for cause and peremptorily.

After the jury were sworn upon their *voir dire*, examined, accepted, and sworn to try the cause, and after the opening statements were made by the State and the defendant, and while the first witness was examined, Henry Edmonds, one of the jurors, left the box and approached the judge, to whom he said, that since listening to the opening statement of the prosecuting attorney he thought he might have talked about the case. The juror then returned to his seat, and the court, in the presence of the jury and the parties, made known the communication which had been made.

Soon after, the appellant asked that court be adjourned until the next morning, in order that a motion might be made regarding the communication received from the juror. The next morning, on the opening of court, the jury and the parties being present, the defendant moved the court for an examination of said juror as to his competency to sit in the case. To this motion the prosecuting attorney, for the State, objected, claiming that the court could not entertain the motion, because the proper motion was to set aside the submission of the cause to the jury, after which the jury might again be examined on their *voir dire*. The court, however, held that the motion to set aside the submission might be made afterwards, if an examination of the juror should show that this ought to be done.

The juror was thereupon examined by the parties,

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after which counsel for defendant challenged the juror for cause, which challenge was overruled by the court. The record next recites: "Now, here, the defendant, at the same time and place, challenges the said Edmonds peremptorily, the said defendant having exhausted, in the said cause, in the impaneling of said jury, only fifteen peremptory challenges, and moves the court to excuse said juror so peremptorily challenged by defendant, and put another juror in the box in his place, which motion the court now here denies and overrules, to which the defendant excepts."

The answers made to the examination of the juror show that he was competent; and hence there was no error in overruling the challenge for cause, even if it had been made before the impaneling of the jury. It did not appear that he had formed or expressed any opinion in the case; but only that, perhaps from an over-sensitive conscience, he was fearful, on hearing the prosecutor's statement, that he might have formed or expressed such opinion; which opinion, if any there was, the juror said, would readily yield to the evidence and would not prevent him from rendering a fair and impartial verdict.

Appellant insists that even if it were true that he had no right to challenge the juror for cause, he certainly had a right to challenge him peremptorily; that he had not exhausted the twenty peremptory challenges given him by the statute; that, with or without fault, the juror had, on the original examination, conceded the fact that he had, or might have, expressed some opinion in the case, and so had deprived the appellant of a right guaranteed him by the law; that the right to a peremptory challenge is given to enable a defendant to reject a juror whom he does not like, or of whom he is fearful, even though he may not be able to give any reason for such dislike or such fear, or

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though the challenge may be made for a mere whim, unaccountable even to himself.

It is indeed clear that the right to a peremptory challenge is just as absolute as the right to a challenge for cause, and for the reasons given by counsel. We think, however, that in this case the appellant did not pursue the proper course. After the acceptance of the jury, and after they are sworn to try the cause, it is too late to examine them as to their competency, or to peremptorily challenge any of their number, unless there be first interposed a motion to set aside the submission. Had there been, in this case, a motion to set aside the submission of the cause to the jury, with a view to the re-examination of this juror on his *voir dire*, and had the court overruled such motion, we should have a very different case before us.

Nor was it by any oversight or inadvertence that counsel did not make the proper motion. The motion that should have been made was suggested by the prosecuting attorney, and the court intimated that such motion to set aside the submission to the jury might be made, in case it was desired, after the juror should be examined. Counsel for appellant, however, did not seek to avail themselves of such right to move the setting aside of the submission, either before or after the juror's examination. Certainly the juror to whom the cause had been submitted could not be excused, and another juror, to whom it had not been submitted, put in his place. The cause must be submitted to the jury as a whole; and to re-examine any juror it would first be necessary to set aside the submission to the jury. The jury would then be in the condition in which they were before they were sworn. Appellant having failed to avail himself of the means by which he might have made his peremptory challenge good, cannot now complain that the court refused to

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grant him this privilege in violation of the proper procedure.

By section 1863, R. S. 1894 (section 1794, R. S. 1881), "All challenges for cause shall be summarily tried by the court on the oath of the party challenged or other evidence, and shall be made before the jury is sworn." The rule as to the time when a peremptory challenge may be taken is the same. "Either party," said Judge Dewey, in *Beauchamp v. State*, 6 Blackf. 299, "may challenge at any time between the appearance and the swearing of the jury. 1 Chitt. C. L. 545." And see *Munley v. State*, 7 Blackf. 593; *Morris v. State*, 7 Blackf. 607; *Jackson v. Pittsford*, 8 Blackf. 194; *Wyatt v. Noble*, 8 Blackf. 507; 1 Bish. New Crim. Proced., sections 932 and 945.

The court, therefore, in the absence of a motion to set aside the submission, did not err in overruling appellant's peremptory challenge.

The judgment is affirmed.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1896, IN THE EIGHTIETH
YEAR OF THE STATE.

146	124
151	442
146	124
154	619

ZIMMERMAN, TREASURER, *v.* SAVAGE.

[No. 17,702. Filed May 26, 1896.]

DRAINAGE.—*Cleaning and Repairing Ditch.*—*Notice of Allotment.*—*County Surveyor.*—In an action to enjoin the county treasurer from collecting the expenses of cleaning out and repairing an allotment of a public ditch, it will be presumed that the county surveyor gave the proper notices of allotments, as required by section 5634, Burns' R. S. 1894.

SAME.—*Cleaning and Repairing Ditch.*—*Allotment.*—*Collateral Attack.*—The order of allotment of a public ditch, by the county surveyor, for the purpose of cleaning and repairing, made upon proper notice, is not subject to collateral attack, on the ground that a majority of the persons assessed did not petition for a reapportionment, as an appeal to the circuit or superior court is the exclusive remedy.

PLEADING.—*Complaint.*—*Injunction.*—*Damages.*—*Township Trustee.*—In an action to enjoin a county treasurer from collecting the expense of cleaning out and repairing an allotment of a public ditch, an allegation in the complaint that the plaintiff cleaned the allotment to the depth originally established, for the year for which it is claimed the township trustee cleaned the same, does not negative the legal right of the latter to clean the ditch for that year, in

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the absence of an allegation that plaintiff's work was to the acceptance of the trustee, as the trustee may determine that an allotment has not been properly cleaned out and repaired, and his decision made in good faith is final.

DRAINAGE.—Cleaning and Repairing Ditch.—Void Allotment.—Township Trustee.—A landowner is liable for the expense incurred by a township trustee in cleaning the portion of a public ditch allotted to him by the county surveyor, to the extent that such allotment includes the original allotment for construction, even though the surveyor's allotment is void.

JUDGMENT.—Injunction.—Drainage.—Township Trustee.—Former Adjudication.—A judgment in favor of a township trustee, in an action by an allottee of a public ditch, to enjoin the trustee from cutting the channel in his allotment deeper than required by the original plans and specifications, in which the trustee answered by alleging that the allottee had pretended to clean out his allotment, but had failed to clean to the depth required by the original plans and specifications; and that as such trustee he had refused to accept the work done by him, and that he proceeded to clean the same out to the original depth and width, is conclusive as to the right of the trustee to clean the allotment, in a subsequent action to enjoin the county treasurer from collecting the expense of cleaning out the same.

From the Fulton Circuit Court. *Reversed.*

Holman & Stephenson, for appellant.

Connor, Rowley & McMahan, for appellee.

MONKS, C. J.—Appellee brought this action to enjoin appellant, as county treasurer, from collecting the expense of cleaning out and repairing appellee's allotment of a public ditch.

Appellant demurred to the complaint for want of facts, which was overruled. Appellant filed an answer in two paragraphs, to the second of which appellee filed a reply. The cause was tried by the court, and at the request of the parties, the court made a special finding of facts, and stated its conclusions of law thereon, and over a motion for a new trial judgment was rendered in favor of appellee. The errors assigned call in question the action of the court in

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overruling the demurrer to the complaint; the correctness of each of the conclusions of law, and the action of the court in overruling the motion for a new trial.

The complaint, so far as necessary to determine the questions presented, is substantially as follows: Appellee is now, and has been for twenty-five years, the owner of the following real estate (describing it); that a public ditch was established by the board of commissioners of Miami county in 1878, and that said ditch was through the lands above described; the allotments for construction were made by the reviewers, and 4,068 feet thereof was allotted for construction to appellee, who constructed the same according to the plans and specifications; that after the construction of the ditch, he, and those acting under authority of law, have cleaned that part of said ditch allotted to him, to the depth thereof originally established by the board of commissioners, to and including the year 1892; that in the allotment made by the surveyor, and the only one that has been made since the construction of the ditch for the purpose of apportioning it for cleaning out or repairing, appellee avers that a majority of the persons whose lands were assessed with benefits for construction of said ditch, did not petition the surveyor to reapportion the same for the purpose of cleaning out and repairing; that on the — day of July, 1893, one William Belt, trustee of Allen township, in said county, by virtue of his office, in pursuance of a claim made by him of cleaning out and repairing said ditch, entered upon plaintiff's lands and dug and deepened said ditch three feet below the original depth of said ditch as established, westward through appellee's land a distance of 4,068 feet, and for the work aforesaid, and no other, the said Belt, as such trustee, under his hand, certified to the auditor of Miami county, a sum in gross of \$210.96, which said

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auditor charged against said lands on what is called the ditch tax duplicate, but did not extend said sum on the tax duplicate against said land, or any portion thereof; that said auditor has delivered the ditch tax duplicate, containing said assessment, to said Zimmerman, treasurer of said county, who is threatening to collect said sum of money from appellee, and unless restrained and enjoined, will sell appellee's property, of which he owns a large amount, and in that way irreparably damage appellee. And appellee says that the court should enjoin appellant from collecting said sum for the further reason that said act of 1891, in section 2, provides that the work of repairing ditches by township trustees shall be done only after notice from the trustee to the landowner, which notice must be given before the first day of August, of each year. And further provides that the work of cleaning out and repairing ditches or drains shall be performed between the 1st day of August and the 1st day of November, in each year, only in pursuance to such notice, given prior to August 1; that no notice was given appellee by said Belt, trustee, as aforesaid, at any time in the year 1893, to clean out, repair, or to do any work whatever upon said ditch, or any part thereof, and that whatever work the said Belt did, or caused to be done, before or after August 1, 1893, and during said year, the same was without notice to appellee. And the said appellant should be enjoined from collecting the said sum for the further reason that by the allotments, as set out in the reviewer's report, the same were against the said lands of appellee's as follows: Station 21 x 32 down stream to station 62, a total length of 4,068. But he says the allotment against said lands, as the same was made by the county surveyor, was from station 107 x 54 to station 48 x 22, a distance of 4,068, and that the allotments

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so made, for the purpose of cleaning out and repairing said ditch, are not the same as they were for the construction thereof, but the allotments as made extend the allotments down stream about one hundred feet below said station 62, and in that respect the allotments for repairs and in violation of the law which requires them to be the same as for construction. Wherefore appellee prays for injunction, etc.

Section 5633, R. S. 1894 (section 2, Acts 1889, p. 53), authorizes the county surveyor to allot to the owner of each tract of land assessed for the construction of a drain or ditch, the portion he should annually clean out and keep in repair, provided, that when the ditches were originally allotted for construction by reviewers appointed by the board of county commissioners, the allotments shall remain the same for repairs, unless a majority of the parties assessed shall petition for a reapportionment, under the provisions of this act.

Section 5634, R. S. 1894, provides that the surveyor shall give notice to the landowners of the time and place he will hear objections to such allotments. Section 5635, R. S. 1894, makes provision for the hearing, and section 5635, R. S. 1894, gives any person aggrieved the right to appeal from such order of the surveyor to the circuit or superior court. It has been repeatedly held, by the courts of last resort in this State, that if such notice was given by the surveyor, that the only remedy was by appeal. *Beatty v. Pruden*, 13 Ind. App. 507; *Terre Haute, etc., R. R. Co. v. Soice*, 128 Ind. 105; *Davis v. Lake Shore, etc., R. R. Co.*, 114 Ind. 364; *Trimble v. McGee*, 112 Ind. 307.

The presumption is that the county surveyor gave proper notice of the allotments made to appellee, and

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all other parties, and there is no allegation in the complaint to the contrary.

Whether or not a majority of the persons assessed petitioned for a reapportionment, was a question to be determined by the surveyor before making any allotment, and which could have been presented by appellee at the time when, and place where, the surveyor heard objections to such allotment, and could have been raised on appeal to the circuit or superior court. This not having been done, the order of the county surveyor, in making the allotment, cannot be attacked collaterally.

The allegation that appellee, and those acting under authority of law, have cleaned that part of the ditch allotted to him, to the depth originally established, to and including the year 1892, does not state facts showing that the township trustee had no legal right to clean out the ditch for the year 1892.

If the work for which the \$210.96 expense was incurred was done in July, 1893, as alleged, it will be presumed that it was to complete the repair of 1892, as no facts are stated showing the contrary.

There is no allegation that the township trustee did not notify him in 1892, as required by the provision of section 5638, R. S. 1894, within what time, between August 1 and November 1, of said year, he was required to clean out that part of the ditch allotted to him. Neither is it alleged that he, or anyone else, cleaned out his allotment for the year 1892, to the acceptance of the township trustee. *Norris v. Tice*, 13 Ind. App. 17. The presumption is that the township trustee discharged his duty in every respect, and such presumption can only be overcome by alleging such facts as show the contrary. It is for the trustee to decide whether an allotment of a ditch has been properly

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cleaned out and repaired, and, although a person may have cleaned out and repaired his allotment of a ditch, it is the duty of the trustee to determine whether the same has been properly done, and if, in the exercise of that discretion, the trustee decides that the same had not been cleaned out to the depth and width of the original plans and specifications and, in good faith, causes the same to be cleaned out and repaired, as nearly as may be according to such plans and specifications, he has discharged his duty, and the question of the propriety of the repairs can neither be reviewed nor taken into consideration, for the reason that upon this question the decision of the trustee is final. *Artman v. Wynkoop*, 132 Ind. 17, and cases cited on p. 19; *Romack v. Hobbs*, 13 Ind. App. 138.

There is no allegation in the complaint showing that the township trustee acted corruptly or in bad faith in cleaning out and repairing appellee's allotment of said ditch.

Even if the alleged allotment made by the county surveyor was void, yet to the extent that the trustee, in good faith cleaned out that part of the ditch allotted by the reviewers to appellee for construction, he would be liable to pay therefor. *Scott v. Stringley*, 132 Ind. 378; *Romack v. Hobbs*, *supra*.

We think, therefore, that the court erred in overruling the demurrer to the complaint.

For the same reasons, each of the conclusions of law was erroneous.

It appears, from the evidence, that said ditch had become partially filled up, and it was necessary to clean out and repair the same. In order to ascertain the depth and width, it was proper to clean out said ditch so as to conform to the original plans and specifications, Belt, the trustee of Allen township, procured Jackson, a civil engineer, to make a survey

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thereof, and set the grade stakes along the bank, showing the depth and width, according to the original plans and specifications. Such survey was completed July 17, 1891, and the township trustee, in July, 1892, served a written notice on appellee to clean out and repair the part of the ditch allotted to him by the reviewers for construction, to the full width and depth required by such survey; that, pursuant to such notice, appellee cleaned out and repaired, as he claimed, the 4,068 feet allotted to him for construction by the reviewers, which work was done by him before November 1, 1892. The township trustee refused to accept the work as completed, for the reason that it was not cleaned out to the depth and width required by the original plans and specifications, as shown by the survey of Jackson, the civil engineer, made in 1891. Appellee contended that the survey of Jackson required the ditch to be cleaned out from one to three feet deeper than the original plans called for, and refused to clean out said ditch to any greater depth or width; thereupon the township trustee, after the 1st of November, 1892, employed a number of men, and proceeded to clean out appellee's allotment of said ditch to the width and depth shown by the Jackson survey.

After about one thousand feet of appellee's allotment had been cleaned out to the width and depth as shown by said survey, he commenced an action in the Miami Circuit Court against said township trustee and the others, to enjoin them from cutting the channel deeper than required by the original plans and specifications, alleging, among other things, that said trustee had dug the part already cleaned out three feet deeper than the original depth, as shown by the plans and specifications. The allegations in said complaint were substantially the same as those

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in the complaint in this case, except the defendants in that action were the trustee and those acting under his directions. Belt, the township trustee, filed a second paragraph of answer, in which he alleged "that he was cleaning out appellee's allotment to the depth and grade as originally established, as shown by the Jackson survey, and that he had examined and accepted the work already done under his direction and completed to the point indicated in the complaint.

The plaintiff (appellee) pretended to clean out such portion of the ditch allotted to him, but has failed and refused to clean out to the depth required by the original plans and specifications, and that, as such trustee, he had refused to accept the work so done by him, and is proceeding to clean the same out to the original depth and width, without enlarging or cutting the banks," etc.

The cause was tried by the court, and a finding made in favor of Belt, township trustee, and his co-defendants, and judgment rendered accordingly. Afterwards, the township trustee caused all of said ditch to be cleaned out to the depth and width required, as shown by the Jackson survey, and the expense of cleaning out appellee's allotment, incurred and paid by the township, was \$210.96, which was certified by him to the county auditor, to be placed on the tax duplicate for collection.

The adjudication in said cause was pleaded by appellant in his second paragraph of answer, in bar of this action. During the progress of the trial the papers and entries, including the final judgment in said cause, were offered in evidence by appellant in support of his answer of former adjudication, but were excluded by the court.

This action of the court is specified as one of the causes for a new trial.

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We think the court erred in excluding said record. The subject-matter of the litigation in that cause was whether the trustee had the right to make said repairs, on account of which the expense of \$210.96 was incurred and paid by the township trustee, the collection of which is sought to be enjoined in this action. The issues, and the evidence required to establish such issues in that case, were the same as in the case at bar. All the questions in this case might have been litigated in that.

It is settled law in this State, that whenever a matter is adjudicated and finally determined by a competent tribunal, it is considered forever at rest. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated. *Parker v. Obenchain*, 140 Ind. 211; *Wilson v. Buell*, 117 Ind. 315, and authorities cited.

But appellee insists that the doctrine of former adjudication cannot apply, because the parties are not the same. Appellant is only a nominal party, the real party in interest is the township of Allen, represented by its trustee. *Stingley v. Nichols*, *supra*; *Bigelow Estop.*, 119, 120.

Allen township is the only party financially interested in the collection of the \$210.96. This amount has been paid out of its treasury for the expense of cleaning out appellee's allotment. The appellant is charged by law with the collection of \$210.96 for said township, and when collected the same must be paid over to the trustee thereof. His authority to collect the same depends upon whether the township trustee had the right to clean out and repair appellee's allotment of said ditch, in the manner in which he did. In the case brought by appellee against the trustee, the Miami Circuit Court adjudged that the trustee had the

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right to clean out and repair said ditch to the depth and width as shown by the Jackson survey. After such adjudication, the township trustee completed said work according to said survey, and thereby incurred said expense, which he paid and certified to the county auditor for collection.

Appellant, in collecting the \$210.96, acts as the agent of, and represents the township, just as did the township trustee in cleaning out the ditch and paying therefor. In the first case, the action was against the principal; in this case, the action is against the agent.

It is clear, we think, that the parties in interest are the same in each case. *McCleskey v. State, ex rel.*, 4 Tex. Civ. App. 322; *Baker v. State, ex rel.*, 109 Ind. 47; *Herman Estop.*, sections 85, 108, 109, 152; *Bigelow Estop.*, 119, 120.

It follows, therefore, that the court erred in overruling the motion for a new trial.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

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[No. 17,776. Filed May 26, 1896.]

145	134
161	639
145	134
164	62
145	134
171	398

WILL.—Devise.—Common Law Rule Modified by Statute.—The common law rule that a devise of real estate generally and without words indicating the character of the estate devised carries but a life estate, is modified by section 2737, Burns' R. S. 1894 (section 2567, R. S. 1881).

SAME.—Intention of Testator.—Partial Intestacy.—Construction.—A testator will not be presumed to have intended partial intestacy, unless the language of the will compels such construction.

SAME.—Devisee Charged with Payment of Money.—Construction.—A devisee charged with the payment of money in respect to the es-

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tate given him, takes a fee-simple, if there is no limitation over, and the character of the estate devised is not described.

SAME.—*Devise.*—*Construction.*—By separate items, a testatrix devised to each of her four children a described tract of land, employing in each instance the words: "My express will is that after my death my beloved son [or daughter] shall have and own, in his own name," the land described. Following the item so devising, to one child, were the words, "And after her demise said lots shall rest in her children's name," and by a separate item, another child was charged with the payment to his two brothers and sister several sums of money aggregating \$1,300; *Held*, that each of the devisees took estates in fee-simple.

From the Warrick Circuit Court. *Affirmed.*

J. E. Williams and *G. Palmer*, for appellant.

Handy & Armstrong, for appellees.

HACKNEY, J.—This appeal presents the question as to the estate devised to the appellees, by the will of Henrietta Gerichs, the mother of the appellant and the appellees. By separate items she devised to each of her four children a described tract of land, employing in each instance the words: "My express will is that after my death my beloved son," or daughter, "* * * shall have and own, in his name," the land described. In the item so devising to the appellant, and following the description of the lot devised, were the words: "And after her demise said lots shall rest in her children's name." By a separate item, the son Henry W. was charged with an obligation to pay to his two brothers and sister several sums of money, aggregating \$1,300.00. The appellant's contention is that, under the rule that a devise of lands generally, and without words indicating the character of the estate devised, carries but a life-estate, her brothers did not take a fee in the tracts so severally devised to them, but took estates for life only.

On behalf of the appellees, it is insisted that, notwithstanding the rule stated, it is manifest from the

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whole will that the testator intended to devise to them in fee-simple. The rule above stated we understand to be that prevailing at common law, and that it is the law in this State, where it is not modified by statute or by other well established rules of testamentary construction. *Rogers et al. v. Winklepeck et al.*, 143 Ind. 373; *Ross v. Ross*, 135 Ind. 367; *Fowler v. Duhme*, 143 Ind. 248, and cases cited.

By statute it is provided that "Every devise, in terms denoting the testator's intention to devise his entire interest in all his real or personal property, shall be construed to pass all of the estate in such property," etc. R. S. 1894, section 2737 (R. S. 1881, section 2567). While this statute does not defeat the common law rule, it implies that that rule shall not prevail as against the intention of the testator "to devise his entire interest." The rule that the testator's intention shall prevail, notwithstanding the common law, has been applied in this State. *Ross v. Ross*, *supra*; *Mills v. Franklin*, 128 Ind. 444; *Morgan v. McNeeley*, 126 Ind. 537; *Patterson v. Nixon*, 79 Ind. 251.

That it is the general rule for the construction of wills that the intention of the testator is of first importance, is without question. One rule of intention is that a testator will not be presumed to have intended partial intestacy, unless the language of the will compels such construction. *Borgner v. Brown*, 133 Ind. 391; *Spurgeon v. Scheible*, 43 Ind. 216; *Cate v. Cranor, Exr.*, 30 Ind. 292. This rule has been applied to defeat that of the common law, above referred to in *Morgan v. McNeeley*, *supra*; *Mills v. Franklin*, *supra*.

Partial intestacy would be written upon each of the three devises to the appellees, if the appellant's contention should control. Another rule of intention is that where a devisee is charged with the payment of

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money, in respect to the estate in his hands, he takes a fee-simple in such estate, there being no limitation over, on the principle that he might otherwise be loser. *Jackson v. Bull*, 10 Johns (N. Y.), 148; *Wait v. Belding*, 24 Pick. (Mass.) 129; 2 Redfield Wills, 323; 2 Jarman Wills, 248, 252; Beach Wills, p. 337; 6 Am. and Eng. Ency. of Law, p. 877.

This principle was recognized in *Ross v. Ross*, *supra*, but was perhaps stated with inaccuracy, as applying to charges against the land rather than the devisee. The charges in this will against Henry W. were evidently designed to equalize all of the devisees. There is no possible construction of the words of the testator which would imply a purpose to give to any one of the appellees an estate of a different character from that given to Henry W. The words of devise are identical in every instance.

In speaking of the rule of the common law, this court said, in *Roy v. Rouse*, 90 Ind. 54: "This rule often operates in contradiction of the rule that the testator's intention shall prevail, especially in the case of wills made by persons unskilled in the law; for the common mind will usually suppose that a general devise, without limitation, carries the whole estate of the testator. Therefore, if the will contain any expression, in addition to the general devise, indicating an intention to pass a fee-simple, the court will use this to bear out the intention; though it must, in some way, affirmatively appear, courts are easily satisfied that an estate of inheritance was intended. *Cleveland v. Spilman*, 25 Ind. 95. They are always ready to adopt any plausible excuse for rescuing particular cases from the wrong direction, which the general rule would give them. 2 Redf. Wills, 327."

We think, in view of the statute above quoted, that this proposition could have been made even stronger

by stating that the common law rule will not be allowed to defeat the testator's intention, where that intention can be otherwise reasonably ascertained.

The common law rule at most is but a guide to the ascertainment of the testator's intention, and it must take its place in connection with the other established rules for like purpose. To give that rule the control of the question made by the appellant, would set at naught the rule against partial intestacy, and that carrying a fee-simple where the devisee is charged with the payment of sums in respect to the estate devised.

The further argument is made, that the intention to devise a fee as to each appellee is indicated by the words closing the devise to the appellant, which suggest, as counsel claim, that the testator would have employed such words in the devises to the appellees, if he had intended to devise but life-estates to them. We do not offer an opinion as to the effect of such words upon the devise to the appellant, since it is not a question in this case as to whether she took a fee or a life-estate, but we are constrained to believe that the testator, by employing such words, understood that those preceding carried an estate higher than a mere life-estate. The words so preceding are, as we have seen, identical with those employed in each devise to the appellees, and were certainly employed in the same sense.

Counsel for appellees place much stress upon the words: "Shall have and own in his own name," as implying an intention to devise a fee. We do not pass upon the strength of these words, though they would seem to be as strong as those employed in *Patterson v. Nixon*, *supra*, where the devise was of "the farm to belong to my son Thomas J." Upon the proposition already considered, it is our opinion that the appellees

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took titles in fee-simple, and that the lower court did not err in overruling the appellant's demurrer to the several cross-complaints of the appellees.

The judgment of the circuit court is affirmed.

POUNDSTONE ET AL. v. BALDWIN.

[No. 17,804. Filed May 26, 1896.]

DRAINAGE.—Petition.—Statute Construed.—Under sections 5622–5630, Burns' R. S. 1894, a petition to straighten, deepen, and tile an old open drain, does not have to be signed by a majority of the resident landowners.

SAME.—Eminent Domain.—The taking of private property, authorized by the drainage laws of this State, is for a public and not a private use.

SAME.—Assessment of Benefits and Damages.—Where the assessment of benefits in favor of a landowner for the repair of a drain exceeds the assessment of damages, he cannot require the payment of damages assessed before the work is established.

APPELLATE PROCEDURE.—Appellant.—An appellant can only bring before the court such questions as affect his rights, and not such as affect the rights of others.

PRACTICE.—Jurisdiction.—Amended Petition.—Where the court has acquired jurisdiction over the parties to the original petition, it has authority to allow an amended petition, even though the original was not good on demurrer.

From the Cass Circuit Court. *Affirmed.*

Magee & Funk, for appellants.

D. C. Justice, and *Nelson & Myers*, for appellee.

MONKS, C. J.—Appellee filed, in the court below, his petition for the drainage of certain real estate, by straightening and deepening an old open drain and laying tile therein.

Appellants were named as landowners who would be affected by the proposed work. Afterwards, an amended petition was filed, to which appellants filed a

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plea in abatement. Appellee filed a demurrer to the plea in abatement, which was sustained.

Appellants filed their remonstrance against the proposed work and for damages. The cause was tried by the court, and at the request of appellants, the court made a special finding of the facts and stated the conclusions of law thereon, to each of which each appellant excepted. Over appellants' motion in arrest of judgment, the court rendered judgment that the proposed work be established, etc.

The errors assigned and not waived are:

1. The court erred in sustaining the demurrer to the plea in abatement to the amended petition.
2. The court erred in each of its conclusions of law.
3. The court erred in overruling the motion in arrest of judgment.

The plea in abatement to the amended petition, proceeded upon the theory that this proceeding was under the sections 5649, 5663, R. S. 1894, acts 1893, p. 159, providing for the tiling of public drains. This act requires that the petition for tiling such drains be signed by a majority of the resident landowners along the line and benefited by the tiling of such drain.

The law of 1893, sections 5649, 5663, *supra*, does not contemplate any substantial change in such drain, except changing the same from an open to a covered drain, while the amended petition is to *straighten* and *deepen* an old drain. The amended petition shows that this proceeding was brought under sections 5622, 5630, R. S. 1894. Acts 1885, p. 219; *Rogers v. Venis*, 137 Ind. 221, and cases cited, p. 224; *Sample v. Carroll*, 132 Ind. 496, 498. The last named law does not require that the petition be signed by a majority of the resident landowners.

There was no error, therefore, in sustaining appellee's demurrer to the plea in abatement.

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Counsel for appellants urge that the court erred in its first conclusion of law; that appellee was entitled to have the proposed work established as prayed for in his petition, for the reason that it is not found in the special finding that the drainage proposed is practicable. Such fact, as well as all other essential facts to which counsel for appellants have called attention, are set out in the special finding. The court did not err therefore in its first conclusion of law.

The second conclusion of law is, that appellant Poundstone is entitled to receive \$50.00 damages for the destruction of timber, to be paid out of the funds of said ditch.

Counsel for said appellant insist "that before said work could be established that the damages assessed must first be paid or tendered. That the taking of private property to establish a drain is not a taking by the State, but by the individual who fancies that his land will be benefited by such drain."

This contention is based upon the theory that the construction of a drain is the taking of one man's property for the use of another.

This court has uniformly held that the taking of private property, authorized by the drainage laws of this State, was for a public and not for a private use. *Zigler v. Menges*, 121 Ind. 99; *Heick v. Voight*, 110 Ind. 279, and cases cited; *Anderson v. Baker*, 98 Ind. 587, and cases cited; *Wishmier v. State*, 97 Ind. 160, and cases cited; *Chambers v. Kyle*, 67 Ind. 206; *Tillman v. Kircher*, 64 Ind. 104.

The discussion of counsel upon this point is answered fully and completely by this court in the case of *Ross v. Davis*, 97 Ind. 79, page 83, in which the court says: "It is insisted that the provisions for the construction of drains, made in the statute, are intended for private benefit only. Although the proceedings for

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the construction of a drain under the statute, such as the appellee instituted, can be commenced only by an owner or owners of lands which will be benefited by drainage, yet this objection of the appellants is sufficiently answered by referring to the provision of the statute, that the petition of such owner or owners shall state that in the opinion of the petitioner or petitioners the public health will be improved, or one or more public highways of the county or streets of a town or city will be benefited by the proposed drainage, or the proposed work will be of public utility; and the requirement that the commissioners of drainage shall consider whether, when accomplished, the drainage will improve the public health or benefit any public highway in the county, or street of a town or city, or be of public utility; and the provision that any owner of lands affected may remonstrate on the ground that the proposed work will neither improve the public health, nor benefit any public highway of the county, nor be of public utility, and that if the finding of the court be in support of the remonstrance, on this cause of remonstrance the proceedings shall be dismissed at the cost of the petitioner; also, the provision for the keeping of such drains, after their construction, in proper repair and free from obstruction by the public, through the township trustee, at public expense. *Ingerman v. Noblesville Tp.*, 90 Ind. 393.

"It is not necessary, in order that the use may be regarded as public, that the whole community or any large portion of it may participate in it. If the drain be of public benefit, the fact that some individuals may be specially benefited above others affected by it will not deprive it of its public character. * * *

"We have no doubt that it is within the power of the legislature to make provision for the construction of such drains, so that the costs, damages, and ex-

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penses of effecting the drainage will be provided for by means of the assessment of benefits to the owners of the lands to be benefited; that just compensation for property appropriated for the making of such a drain may be made in such benefits, or if there be no benefits to a particular owner of property taken, or if the benefits to such person be not sufficient to make just compensation thereby to him, provision may be made for payment to him in money obtained by the assessment of benefits to other property beneficially affected."

No damage in excess of benefits were assessed to any of the appellants, and they have no interest in the question whether provision should be made for prepayment of damages to others. See *Zigler v. Menges*, *supra*.

In this case, the assessment of benefits to appellant Poundstone is \$200.00; the assessment of damages \$50.00, leaving his benefits \$150.00. So that in any event he cannot complain as long as the benefits exceed the damages, for he is, in fact, and in the contemplation of the statute, paid in benefits, and the other appellants have no interest in the question. *Wilson v. Talley*, 144 Ind. 74.

It is next urged that it is alleged in the petition that Andrew Caldwell owned two tracts, of forty acres each, and that it is not shown that he was served with notice of the proceeding.

Only one of said forty-acre tracts was assessed with benefits, and the special finding states that said forty acres was the property of the heirs of Andrew Caldwell. Section 5623, R. S. 1894, provides that it is sufficient to give in the petition the name of the owner of each tract affected, as it appears according to the last tax duplicate or record of transfers kept by the county auditor, and it was proper to give the name of the

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owner of each tract as it appeared on the last tax duplicate or transfer book. *Carr v. State*, 103 Ind. 548. The record shows that a number of landowners, whose lands were described in the petition, joined in a waiver of notice and appeared to the proceeding and consented to the construction of the drain, and among the number were James Caldwell, Elizabeth Caldwell, and Elizabeth Caldwell, guardian of H. V. Caldwell. There is no allegation in the petition that said parties own any real estate, nor are they named in the petition. It is shown by the record that all the owners of the land named in the petition, have been notified or appeared to the proceeding, except Andrew Caldwell. It would seem, therefore, that the above named persons were the heirs of Andrew Caldwell, and that the court had jurisdiction of the persons of all the owners of the land described.

Besides, neither Andrew Caldwell or his heirs have appealed to this court. No one claiming to be the owner of the real estate alleged in the petition to be the property of Andrew Caldwell is here complaining of any action of the court below.

The rule is that appellants can only bring before the court such questions as affect their rights, and not such as affect the rights of others.

The fact that one or more of the landowners was not notified will not vitiate the proceedings as to those who were properly notified. *Carr v. Boone*, 108 Ind. 241, 244; *Grimes v. Coe*, 102 Ind. 406; *Zigler v. Menges*, *supra*; *Steel v. Empsom*, 142 Ind. 397.

The court had ample authority to allow appellant to file an amended petition, even though the original petition did not state facts sufficient to constitute a cause of action. The court had jurisdiction over the parties to the original petition, and they were not entitled to notice of the amended petition. Appellants

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appeared to the amended petition, and filed a remonstrance, and are not in position, for that reason, to raise the question urged. *Zigler v. Menges, supra*, and cases cited.

There is no available error in the record.

Judgment affirmed.

DUNCAN v. LANKFORD, TREASURER.

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[No. 17,856. Filed May 26, 1896.]

PLEADING.—*Collateral Attack.*—*Former Adjudication.*—*Injunction.*—*Drainage.*—A suit to enjoin the collection of a portion of an additional ditch assessment, the correctness and legality of which have been adjudicated, is a collateral attack, and cannot be sustained on the ground that the original assessment should have been deducted therefrom.

APPEAL AND ERROR.—*Harmless Error.*—*Answer.*—*Demurrer.*—Error in overruling a demurrer to a paragraph of answer is harmless, when the case is decided upon evidence which is admissible under other pleadings.

From the Morgan Circuit Court. *Affirmed.*

O. Mathews, for appellant.

W. R. Harrison, and *M. H. Parks*, for appellee.

MCCABE, J.—This was a suit brought by the appellant, against the appellee, as treasurer of Morgan county, to enjoin the collection of a portion of a ditch assessment against the lands owned by the appellant. He tendered that part of the assessment, the validity of which he did not dispute. The amount which he tendered was \$65.00.

The complaint was in two paragraphs, the second being to quiet the plaintiff's title to the land in question against an unfounded lien, asserted thereon by

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the defendant, concluding with a prayer for an injunction against the same, and the removal of the cloud thereby cast upon plaintiff's title.

The defendant answered in two paragraphs, the first of which was a general denial, and the second in confession and avoidance. The court overruled a demurrer to the second paragraph for want of sufficient facts, and the issues were closed by a reply thereto in denial. A trial of the issues by the court, without a jury, resulted in a general finding for the defendant, on which he had judgment over the plaintiff's motion for a new trial.

The ruling on the demurrer to the second paragraph of the answer, and that overruling the motion for a new trial are assigned for error.

The second paragraph of the answer is as follows: "For further answer he says: that all the matters set forth in his complaint were fully adjudicated and determined in a certain ditch proceeding in the circuit court of Morgan county, wherein Johnson Wooden, *et. al.*, were plaintiffs, and said plaintiff, Aetna Insurance Company, and others, were parties and defendants, which proceeding was determined on the 3d day of October, 1892, and the said assessment of benefits, alleged in plaintiff's complaint, was fully ratified and confirmed, and defendant, as treasurer, directed to collect the same, as other taxes are collected, and which judgment remains in full force and unappealed."

It may be conceded that the paragraph did not state facts sufficient to constitute a former adjudication, but it does not necessarily follow that the error in overruling the demurrer thereto was a material and harmful one.

The substance of the complaint is that the amount originally assessed as the benefits to the plaintiff's

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land, derived from the construction of said ditch, was \$70.00, and that such assessment, having been made while the land belonged to one Whitaker, and that the Aetna Insurance Company held a mortgage on it, and afterwards bought the land in on a foreclosure sale under said mortgage; that while said company so held the land it brought suit against the drainage commissioner, and recovered a judgment and decree, perpetually enjoining the whole of said assessment, because its mortgage was prior to the lien of the assessment, and it had not been notified of the proceedings in the circuit court of the county wherein the ditch was established, and that plaintiff had subsequently purchased the land of said company; that afterwards proceedings were had in the circuit court, on petition for an additional assessment on all the lands originally assessed to supply a deficit; that in such additional assessment the drainage commissioners caused a certificate to be filed, showing the amount of the original assessment, together with an additional assessment of \$65.00 against said lands of plaintiff, whereupon the said auditor, without authority of law, placed the same upon the delinquent tax duplicate.

Under the issue made by this complaint, and the general denial, these proceedings in the circuit court, establishing the ditch, the making of the original assessment, and the additional assessment, were admissible in evidence. Indeed, the record shows that the plaintiff introduced in evidence the record of those proceedings himself, without which he could not make out his case. And it appears from them that the additional assessment on appellant's lands was in the sum of \$135.00. And it seems that the appellant supposes that the \$70.00, the amount originally assessed and enjoined, should be deducted from the amount of the additional assess-

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ment. But there is no evidence to show that the additional assessment was designed to embrace the benefits originally assessed. Be that as it may, the legality and propriety of the additional assessment, as the record of those proceedings shows, were vigorously contested before the circuit court, with all the parties in interest before it; and that court ratified and confirmed such additional assessment in the full sum of \$135.00. The correctness and legality of the action of the circuit court in that matter cannot be inquired into by this collateral action; to enjoin the collection of a portion of such additional assessment. This is nothing more nor less than a collateral attack upon the proceedings of a court of competent jurisdiction. Such an attack cannot be maintained, be the proceedings ever so erroneous. *Bowen, Treas., v. Hester*, 143 Ind. 511, and authorities there cited.

This evidence was admissible under the issues without the second paragraph of the answer, and therefore, under the rule established by section 348, R. S. 1894 (section 345, R. S. 1881); *Baker v. Pyatt*, 108 Ind. 61; *Lake Shore, etc., R. W. Co. v. Kurtz*, 10 Ind. App. 60; *Miller v. Bottenberg*, 144 Ind. 312, the error in overruling the demurrer to it was harmless, because the finding of the court, as appears from the whole record, is founded upon that evidence. There was no other evidence offered or given of the nature of the facts stated in the second paragraph of answer. The circuit court could not have correctly found any other way, under the evidence, than for the defendant. There was no available error in the ruling on the demurrer to the second paragraph of the answer, and there was no error in overruling the motion for a new trial.

Judgment affirmed.

JORDAN, J., took no part in the decision.

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KEITH ET AL. v. WILSON ET AL.

[No. 17,882. Filed May 26, 1896.]

MUNICIPAL CORPORATION.—*Street Improvement.—Town Ordinance For.—Statutes Construed.*—A town may, by ordinance, require property-owners to pave sidewalks with brick, stone, or cement, under sections 4394 to 4397, Burns' R. S. 1894 (sections 3357 to 3360, R. S. 1881), notwithstanding the grade therefor had been established years before, and board sidewalks laid thereon at such time.

SAME.—*Street Improvements.—Town Boards May Make with or without Petition.*—Under sections 4394 to 4397, Burns' R. S. 1894 (sections 3357 to 3360, R. S. 1881), the board of trustees of towns may improve sidewalks without petition from the adjacent property-owners, when in the opinion of such board of trustees public convenience requires such improvements to be made.

From the Fulton Circuit Court. *Affirmed.*

S. Keith and *F. H. Terry*, for appellants.

J. H. Bibler and *M. A. Baker*, for appellees.

HOWARD, J.—This was a suit, brought by the appellants, to enjoin the appellees, who are the town trustees and marshal of the town of Rochester, from proceeding to enforce an ordinance, passed by said trustees for the construction of a sidewalk in said town.

A demurrer was sustained to the complaint, and this ruling presents the only question for our consideration.

The ordinance in question was passed under provisions of "An act to compel owners of town lots to grade and pave or plank sidewalks, and fixing the penalty thereto." Approved February 14, 1859. Acts 1859, 184, sections 4394-4397, R. S. 1894 (sections 3357-3360, R. S. 1881).

The first section of the act reads as follows: "Whenever, in the opinion of the board of trustees of any in-

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corporated town in this State, public convenience requires that the sidewalks of any street in such town should be graded or paved or planked, such board of trustees may, by an ordinance, compel the owners of lots adjoining such street to grade, pave, or plank the same."

The second section states the requisites of the ordinance; the third section provides for doing the work by the town marshal on failure of the lot owners to do it, when required by ordinance; and the last section determines the mode of collecting the costs of the work, when the work is done under direction of the marshal.

It is not denied that the ordinance and the subsequent proceedings of the town authorities were in conformity with the provisions of the statute. It is further expressly admitted that the statute is in full force as a valid act of the legislature.

Appellants' brief is an extended, able, and ingenious argument, to explain away the evident purpose and meaning of the statute. Because of the large discretionary powers given the trustees by the act, it is argued that the statute can apply only to the fixing of a grade and ordering the first improvement of a sidewalk; that we cannot conclude that the meaning of the act is to give the trustees the arbitrary power to make such improvements at any time afterwards whenever they might think best to do so. Yet, that is just what the act says. "Whenever, in the opinion of the board of trustees, * * * public convenience requires that the sidewalks of any street" should be improved, then the power is given by this statute to order the improvement made. We cannot explain away the words of the statute, as counsel would have us do.

This is not the only statute that gives to town trus-

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tees such extensive powers. Under section 4357, R. S. 1894 (section 3333, R. S. 1881), cl. 9, boards of trustees in towns are given exclusive power over the streets of the town; and if the streets and alleys are not kept, by the trustees, in a safe condition for public travel, the towns will be liable in damages for injuries resulting. *Sparling v. Dwenger*, 60 Ind. 72; *State v. Mainey*, 65 Ind. 404; *Town v. Woods*, 57 Ind. 192; *Town v. Ritter*, 66 Ind. 136.

If the town authorities did not have this complete control over the streets, the public safety and convenience could not be secured. If the condition of a street or sidewalk should be left to the irresponsible care of the adjacent lot owner, as appellants seem to suggest, then either the traveler, who suffered injury or inconvenience, would be without remedy, or else the town would have to make good the damages which it had no power to prevent.

Arbitrary power on the part of municipal authorities may seem oppressive, and may sometimes, as appellants seem to think in this case, appear to be unjust. But the power to make public improvements in cities and towns without the consent of adjacent property owners, is, as experience has shown, necessary for the general good of the municipality. If cities and towns should have to wait for good streets and sidewalks until all the property owners along the line should agree to have them improved, then the people would become gray and the houses moss-covered before the work should be done.

Accordingly, this arbitrary power has been lodged in some public body, elected by a majority of the people, or otherwise selected.

It is true, that in the making of street improvements in towns, provision is also made for doing the work after petition is made therefor by the resident

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property owners along the line. Sections 4401-4403, R. S. 1894 (sections 3364-3366, R. S. 1881). The method by petition, however, is not in conflict with the more summary method, by direct action of the trustees; but is simply another mode of doing the same work. *Wiles v. Hoss*, 114 Ind. 371.

So in the Barrett law it is provided, that while street and sewer improvements may be made on petition; yet such improvements may also be made arbitrarily, in towns and cities, by the vote of two-thirds of the board of trustees or common council, even against the remonstrance of the property owners. Acts 1889, 237; sections 4288, 4292, R. S. 1894; E. S., sections 812, 816.

Indeed, if it were not for the arbitrary power thus placed in the hands of town trustees and city councils, very little public improvements would be made in our cities or towns. Nor is there anything unjust or oppressive in this. The law assumes that the property will be benefited to an amount equal to the cost of the improvements thus made. In addition, the trustees and members of common councils are elected by the people. They are themselves of the people, and presumably selected for their good judgment and business capacity. It is, therefore, assumed that they will exercise their discretion, not in an arbitrary manner, but for the best interest of their fellow-citizens, whom they represent temporarily in the government of the municipality. Should abuse of their discretion be shown, undoubtedly, as in other cases, such abuse might be restrained. *Town of Marion v. Skillman*, 127 Ind. 130.

Appellants seem also to forget that the statute under which this ordinance was drawn (section 4394, and following sections, R. S. 1894; section 3357, R. S. 1881), has reference to sidewalks only, and not to streets and alleys generally, as in the case of sections

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4401, and following, R. S. 1894 (sections 3364, and following, R. S. 1881). Under the former statute sidewalks only may be improved; under the latter, streets and sidewalks both may be improved. *Wiles v. Hoss, supra.*

In the ordinance of which appellants complain, sidewalks of brick, stone, or cement were ordered laid down on the grade theretofore established. That there should have been a board sidewalk laid on the same grade some years before gives no reason why the trustees should not now order a new and more substantial improvement. Improvements once made do not last forever; and the discretion of the trustees in making a new improvement may be as wisely and honestly exercised as in making the original.

Neither do the authorities cited by appellants sustain their position. It is true, that in the *Town of Covington v. Nelson*, 35 Ind. 532, the court held that a petition was necessary for a sidewalk improvement. But this was evidently an inadvertence. In *Burr v. Town of Newcastle*, 49 Ind. 322, the opinion being written by the same judge that wrote the opinion in the former case, it was said: "In deciding the case of the *Town of Covington v. Nelson, supra*, our attention was not called to an act entitled an act to compel owners of town lots to grade, and pave or plank sidewalks, etc., approved February 14, 1859. 1 G. & H. 634." (Section 4394, R. S. 1894; section 3357, R. S. 1881, the act under consideration in the case at bar.) "By such act," continues the court, "the trustees of towns are authorized to establish a grade and to compel the owners of lots to construct sidewalks, without any petition on the part of property holders."

The other two cases cited by appellants, *Anthony v. Williams*, 47 Ind. 565, and *Case v. Johnson*, 91 Ind. 477,

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were both concerning improvements of streets in general, and not sidewalks only; and the cases were brought under sections 4401, etc., R. S. 1894 (sections 3364, etc., R. S. 1881), where a petition is required, and not under the statute here in question.

Judgment affirmed.

TRIMBLE ET AL. v. STATE, EX REL. STEPHENS,
AUDITOR.

[No. 17,951. Filed May 26, 1896.]

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ESTATES BY ENTIRETIES.—*Husband and Wife.—School Fund Mortgage.—Estoppel.*—Where a husband and wife, holding real estate by entireties, make application, in accordance with the statute, to the county auditor, for, and procure a school fund loan, mortgage such real estate to secure the same, and the money thus procured, with the knowledge and consent of the wife, is used in paying the individual debts of the husband, the wife is estopped from denying the validity of the mortgage.

From the Warren Circuit Court. *Affirmed.*

J. W. Sutton, and Davidson & Storms, for appellants.

C. V. McAdams, for appellee.

JORDAN, J.—This action was instituted by the appellee, to foreclose a mortgage executed by appellants to secure the payment of a loan obtained from the school fund. The questions presented by the appeal arise out of the special finding of facts, and the conclusions of law thereon.

The material facts in the case, as summarized from the court's special finding, are as follows:

On March 19th, 1894, and for fifteen years prior thereto, the appellants, John A. Trimble and Clara J. Trimble, were husband and wife, and said relation still continues; that, on said date, and prior thereto,

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they were the owners, as tenants by entireties, of the real estate described in the mortgage in suit. Several months before the said 19th day of March, 1894, the husband, John A. Trimble, made a verbal application to Samuel C. Fenton, then auditor of Warren county, Indiana, for a loan to him of \$1,500.00 from the school fund, in the hands of said officer. The auditor verbally agreed to make the loan, when the amount of the fund on hand was sufficient, and the defendant could furnish the security required by law; that, upon the auditor discovering that the lands offered as a security were held by Trimble and wife, as tenants by the entireties, he required both of them to join in the execution of the note and mortgage given for the loan, when it was made; that for the purpose of securing said loan before the same was made, the appellants joined in the execution of the affidavit required by section 5803, R. S. 1894 (4376, R. S. 1881). Prior to the making of the loan, the lands in dispute were appraised, as required by the statute, and the appraisal filed with the auditor, and also the required certificate of the clerk and recorder of the county was filed in compliance with the statute, under which the loan was made. At the time the said parties were prepared to perfect the loan in question, there being but \$1,200.00 of the school fund on hand, this amount was, on March 19, 1894, loaned, and the appellants, for the purpose of securing the payment thereof, executed the note and mortgage provided for by the statute. The mortgage was duly acknowledged and recorded in the recorder's office of Warren county, on said 19th day of March, 1894. On the date aforesaid, after the making of the statutory affidavit, as stated, and the execution of the note and mortgage by said Trimble and wife, the auditor, without any objections from Mrs. Trimble, drew, in the name of her husband, an order

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on the county treasury for the said sum of \$1,200.00, so loaned, and the amount of said order was by the treasurer paid to the husband with the knowledge of his wife; that on said day, the husband paid, in the name of himself and wife, as interest for six months in advance, the sum of \$72, upon the loan in controversy. On the day that the appellants procured the loan of \$1,200.00, they expressed a desire to the auditor for an additional \$300.00, in order to increase the loan to \$1,500.00, the amount which the auditor had originally promised to loan. The auditor informed them that as soon as the additional \$300.00, so desired, was on hand they could have it, and the note and mortgage would be changed so as to cover this additional amount, and no objections were made by either of the appellants to this arrangement. Thereafter, on May 10, 1894, the said amount of \$300.00 of the school fund being on hand, the auditor drew a warrant upon the treasury in the name of the husband for that amount, which was paid him. The act of the auditor in drawing the warrant for this latter amount was in accordance with the arrangement made to increase the loan to \$1,500.00; and with the consent of the husband, but in the absence of the wife, the note and mortgage originally executed by the parties were changed by the auditor by substituting \$1,500.00 therein for \$1,200.00; that the mortgage so changed was not recorded, neither was the former record changed or altered; that \$350.00 of the money obtained on the original loan was, by the appellants, applied in settlement of a lawsuit between them and one Mitchell, and the remainder, with the knowledge and consent of the wife, was used in paying the individual debts of the husband. The wife executed the mortgage and note at the request of the husband to obtain the money for the purpose for which the same

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was used, but the auditor had no knowledge or information, at and prior to the time the loan was made, as to what purpose the money was to be applied.

The court further finds that there is due and unpaid upon the mortgage, as first executed, the sum of \$1,268.88, and upon the instrument as changed, the sum of \$1,583.55.

Upon the facts as found, the court stated its conclusions of law in substance as follows:

1st. That the plaintiff is entitled to a decree, foreclosing the mortgage in suit, for the sum of \$1,268.88.

2d. That the plaintiff is not entitled to foreclose the mortgage for the \$300.00 additional loan to the husband, John A. Trimble.

3d. That as to this loan the plaintiff is entitled to a personal judgment against John A. Trimble only, for the sum of \$314.67.

Judgment followed in accordance with the conclusions of law.

The only question presented and discussed by counsel for Clara J. Trimble is the contention that, under the finding of facts, it is disclosed that the execution of the mortgage in question was an attempt to pledge real estate held by her and her said husband, as tenants by entireties, for the debt of the latter. That it was a contract of suretyship, as to her, into which, under section 6964, R. S. 1894 (section 5119, R. S. 1881), she was expressly prohibited from entering, and therefore the instrument is void and cannot be enforced. It is settled law, in this State, that a mortgage executed by a married woman upon her separate real estate to secure the debt of her husband, or others, is invalid. Also, that a mortgage executed by husband and wife, upon lands held by them as tenants by entireties, to secure the debt of the husband, or others, is void as to both. This rule, however, is subject to the prin-

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ciple of estoppel *in pais* as against the wife, by which she is bound, when the same is established, by the facts in any particular case. *Taylor v. Hearn*, 131 Ind. 537, and cases there cited.

It is also settled that where a married woman, to obtain a loan from the school fund, complies with all the statutory requirements, and executes a mortgage upon her real estate to secure the loan so obtained, she is thereby estopped from disputing the validity of the mortgage, and this is true, although the auditor, at the time the loan is made, may have knowledge that the money so derived is to be used for the benefit of her husband or other persons. *Snodgrass v. Morris, Aud.*, 123 Ind. 425; *Lloyd v. State, ex rel.*, 134 Ind. 506; *Davee v. State, ex rel.*, 7 Ind. App. 71; *Welch v. Fisk, Aud.*, 139 Ind. 637.

In *Snodgrass v. Morris, supra*, which was an action by a married woman to cancel a school fund mortgage, upon the ground that the mortgaged premises belonged to the plaintiff, and were mortgaged to obtain money for the husband, Elliott, J., speaking for the court, said:

"A county auditor is a public officer, invested by the statute with certain rights and duties, and he possesses no other rights than those conferred by the statute. He is, in no sense, the owner of the school fund, nor has he any right to release or cancel mortgages given to secure loans made from that fund, except as the statute provides; and there is nothing in the statute empowering him to decide whether a mortgage is, or is not, void because executed by a married woman to obtain money for the benefit of her husband."

In the case of *Lloyd v. State, supra*, where it appeared that the appellant, who was a married woman at the time she executed the mortgage upon her lands

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to secure the loan obtained from the school fund, had complied with all the requirements of the law, it was held that she could not defend against the mortgage, although the money in that case was secured to discharge a debt of the husband, and so applied by the latter, all of which the auditor had knowledge at the time the loan was secured. This court, in that case, said:

“There is nothing to prevent a married woman from securing a loan from the school fund. If she complies with the law she is as much entitled to a loan as any other person, and she is presumed to know the law, as are all persons, and to know what rights and duties the county auditor is vested with. When she executes her note and mortgage, and it is accepted, she has the right to the money which the loan calls for, and if the officer or officers refuse to discharge their duties in this behalf, and refuse to pay the money over to her, she has a remedy, and may compel the payment of it to her; and if she fails to exact her rights in that behalf, or waives her right to the money, and directs the auditor to pay the money to another, or permits him to retain it and apply it to other purposes, she may have a right against him, but she cannot defend against the mortgage executed to the State. The mortgage is the property of the State, and is enforceable against her. The State cannot be prejudiced or suffer loss by reason of her laches in failing to demand and receive the money on the execution of the mortgage, or in directing or permitting the auditor to retain and apply it in payment of her husband's debts.”

In the appeal of *Davee v. State*, *supra*, another branch of the Lloyd case was very fully considered by the Appellate Court, and it was there held that the wife, under the facts in that case, had estopped her-

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self from denying the validity of the mortgage. By these decisions, the principle of estoppel is more strictly enforced against a married woman who seeks to defeat a mortgage, executed by her upon her realty to the State, to secure the payment of a loan from the school fund, obtained under and in compliance with the provisions of the school law, than it has been, perhaps, in a case where the money has been loaned by a private individual. Cogent reasons, however, in support of the principle asserted, are stated by the court in these several decisions, and the rule therein affirmed is controlling in the case at bar.

For obvious reasons, we think, a distinction should be made. The loaning of money to any one by an individual from his private funds is optional with him, and is a matter in which he may fully exercise his own judgment as to when, how, and to whom he will loan. He has the undisputed right to select his own agent to act for him in making loans. He can formulate the written instruments, which he will require the borrower to execute, in order to obtain and secure the payment of the loan. He may impose such legitimate conditions and require such steps to be taken, by applicants for loans, as his wisdom and judgment may dictate. But it is quite different on the part of the auditor, in loaning the money belonging to the school fund. The latter is a public officer, who is commanded by the statute to loan the money belonging to this fund. He has no choice in the matter. The language of the law is, that the money of the fund "shall be loaned." Section 5796, R. S. 1894. All the antecedent steps to be taken by a borrower, are prescribed by the statute. The law even defines the form of the note and mortgage that are to be executed by the borrower. The evident object sought by the legislature, under these statutory requirements, was to

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guard the safety of this sacred fund, and thereby make every loan thereof secure beyond any contingency. *Deming v. State, ex rel.*, 23 Ind. 416.

There is no law to prevent a married woman from joining with her husband in the application for a loan from the school fund, for her own use and benefit, and to join with him in pledging by mortgage real estate held by them, as tenants by entireties, to secure the payment thereof.

In the case before us, it appears that the wife, Mrs. Trimble, voluntarily subscribed to the affidavit prescribed by the statute, and joined with him in producing the certificate of the clerk and recorder, and in complying with the other requirements of the law, in order to obtain the loan in dispute. By these solemn acts of hers she must be held to have represented herself to be an applicant for the loan in question. Having done all this, it was no concern of the auditor to ascertain what arrangement, if any, existed between her and her husband as to the disposition that was to be made of the money to be obtained. When, as provided by section 5796, R. S. 1894 (1261, E. S.), it was shown to the satisfaction of the latter, that the real estate offered by the applicants was in value fully sufficient to secure the desired loan, and that it was held by them by a good and sufficient title, without incumbrance, and not derived from a sale for taxes, and they had fully complied with the other requirements of the law, it was not incumbent, under the statute, upon the auditor to proceed further and ascertain if the money was to be used or applied for the benefit of the wife, and his knowledge of the facts, as to the purpose for which the money was desired, would not be binding upon the State. Had Mrs. Trimble desired that the warrant drawn for

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the money should be made payable to her, it was her duty to demand that the auditor issue it in her favor, and her neglect to do so, and in permitting her husband to receive and use the money, cannot be chargeable against the State. The disability as to suretyship, imposed by the statute upon a married woman, must be considered in connection with another provision of the same act, to the effect that she shall be bound by an estoppel *in pais*, and no construction ought to be given to this exception by the statute of her ability to contract, as will place in her hands a sword to defend her own fraud and imposition on others, instead of a shield for her protection, as the law intended.

Under the facts in this case, it must be held that the appellant, Mrs. Trimble, is estopped from denying the validity of the mortgage in suit, and that the court did not err in decreeing a foreclosure of the mortgage executed for the original loan of \$1,200.00.

No special reasons are urged to show that the judgment against John A. Trimble on the additional loan should be reversed, and hence we do not consider that question.

The judgments are affirmed.

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[No. 17,954. Filed May 26, 1896.]

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APPELLATE PROCEDURE.—*Bill of Exceptions.—Instructions.—Statute Construed.*—Where in accordance with section 544, Burns' R. S. 1894, it is sought to make instructions a part of the record without bill of exceptions, the memoranda on the margin, "given and excepted [signed] W. D. Wilson." and "Given, [signed] W. D. Wilson," and a statement following at the close of certain instructions, that "to the giving of each of the above instructions severally, plaintiff at the time excepted," are insufficient to reserve the exceptions.

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SAME.—*Bill of Exceptions.*—*Evidence.*—Where error is predicated upon an alleged error in excluding certain evidence, the ruling of the court must be verified by bill of exceptions.

TRIAL.—*Argument to Jury.*—*Misconduct of Attorney.*—A reversal for misconduct of counsel in argument to jury, will be ordered by the supreme court only where the improper statements of counsel are of such material character as it appears to be probable that they were the means of securing a wrong verdict.

SAME.—*Misconduct of Juror.*—*New Trial.*—Where the alleged misconduct of a juror is made a cause for new trial, and the evidence in reference to such charge is conflicting, the decision of the trial court thereon will not be reviewed on appeal.

From the Elkhart Circuit Court. *Affirmed.*

Dodge & Hubbell, for appellant.

Baker & Miller, for appellees.

JORDAN, J.—This was an action, commenced by the appellant, to contest the will of John M. Roose, deceased. The grounds of contest were that the will had been unduly executed and that the testator, at the time of the execution thereof, was of unsound mind. A trial resulted in a verdict by the jury in favor of the appellees, and over appellant's motion for a new trial, judgment was rendered upon the verdict. The evidence is not in the record, and the alleged errors of which the appellant complains, arise, in part, out of the action of the court in giving to the jury, at the request of appellees, instructions number one and six, and also in giving certain others on its own motion.

We cannot consider the objections urged by the learned counsel for the appellant, against the several instructions mentioned, for the reason, that no exception was reserved to the giving thereof by the court, in accordance with the requirements of section 544, Burns' R. S. 1894, and section 535, R. S. 1881, wherein it is provided that "a party excepting to the giving of instructions, on the refusal thereof, shall not be required to file a formal bill of exceptions," but it shall

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be sufficient to write on the margin, or at the close of each instruction "refused and excepted to," or "given and excepted to," which memorandum shall be signed by the judge and dated." On the margin, at instruction number one, given at the request of the appellees, we find the following: "Given and excepted. (Signed) H. D. Wilson." At number six the following: "Given. (Signed) H. D. Wilson." It will be seen that neither of these memoranda is dated as the code requires, and the latter one does not disclose that an exception was taken to the action of the court in giving it to the jury.

In the case of *Behymer v. State*, 95 Ind. 140, in considering this section of the code, on page 142 of the opinion, it is said: "Under this section, the date is quite as material as the signature of the judge, *first*, because they are both required by the statute; and, *second*, because it is the date that shows when the exception was taken. It takes the place of the statement in a bill of exceptions, that the exception was taken at the time."

In *Childress, Adm.x., v. Callender*, 108 Ind. 394, the rule upon this question, as affirmed in *Behymer v. State, supra*, was approved. For the reason that the statutory memorandum to instruction number one in question is not dated, the exception is not properly reserved for the decision of this court. There is neither an exception nor date noted to the sixth instruction, and hence for this omission no error can be predicated upon it. The instructions given by the court are all open to the same objection. The only statement to show that exceptions were taken to the latter, is the following at the close thereof:

"To the giving of each of the above instructions severally plaintiff, at the time, duly excepted." This was not in compliance with the requirements of the

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section of the code to which we have referred, so as to be available, to the complaining party. The exception must be noted, either on the margin or at the close of each instruction, which written notation must be dated and signed by the trial judge. This the statute requires in plain imperative terms not open to construction.

Appellant next complains of the alleged misconduct of one of the attorneys for appellee, in his argument to the jury. In the progress of his argument Mr. Miller, the attorney in question, said: "This will should be upheld for many reasons. It has been my experience that when estates are settled under the statute, after the death of a person, many dishonest claims are allowed and collected against estates of a deceased person." To this the appellant objected, which was overruled, and the judge said, in the presence of the jury, "that the statement made by the attorney was harmless, and that he did not see that it was outside of permissible argument." Counsel, continuing, said: "The jury need not consider my experience, but unjust claims have been allowed and paid by estates, and John M. Roose had the right, in making his will, to have a provision therein for the purpose of preventing persons from receiving unjust accounts claimed by them." The will is not in the record, and therefore we are not apprised as to what its provision was relative to unjust claims referred to by counsel in his argument, and which provision apparently seems to have been the cause for the statement made by the attorney; hence it does not appear from the record that the argument was outside of the evidence. The further statement, as to the experience of counsel in regard to the allowance of unjust claims against estates, even if improper, we do not regard as material. It is only where the improper statements

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of counsel are of such material character, as it appears to be probable, that they were the means of securing a wrong verdict that a reversal will be ordered by this court. *Buscher v. Scully*, 107 Ind. 246, and cases there cited.

Appellant contends that a new trial ought to have been granted for the reason of misconduct charged against a juror, one L. G. Brooks. The misconduct imputed to this juror consisted of a general statement said to have been made by him some time prior to the trial, in substance, as follows: "That if he ever sat upon a jury to contest a will he would not agree to a verdict to set it aside no matter what the evidence in the case might be." Affidavits were filed in support of this ground for a new trial. A counter-affidavit of this juror was also filed, in which he emphatically denied that he had at any time made the alleged statement.

It is no longer an open question in this State that where the evidence introduced upon a reason for a new trial is conflicting, the decision of the trial court thereon will not be reviewed upon an appeal. *DeHart v. Aper*, 107 Ind. 460, and cases there cited.

The next and only remaining contention is that predicated upon the ruling of the court, in refusing to permit John M. Roose to testify on behalf of appellant, in rebuttal of evidence given by Wilson Roose. This ruling of the court is not verified by a bill of exceptions, and therefore cannot be considered.

Finding no available error in the record, the judgment is affirmed.

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HIGGINS v. SPAHR ET AL.

[No. 17,406. Filed May 5, 1896. Rehearing denied May 27, 1896.]

FRAUDULENT CONVEYANCE.—*Sale by Husband to Wife.*—*Prima Facie Evidence.*—A *prima facie* case of fraud against creditors is made out, when it is shown that the vendor remained in full possession and management of a livery stable, after having given to his wife a bill of sale therefor.

SAME.—*Sale by Husband to Wife.*—*Possession.*—*Evidence.*—Where the continued possession and management, by the husband, of property sold to his wife, shows that the sale was *prima facie* fraudulent, the declarations of the husband, while in possession as agent of his wife, to the effect that the sale was made to defeat the claims of certain creditors, is admissible to show fraud.

From the Marion Circuit Court. *Reversed.*

T. J. Terhune, and *W. A. Pickens*, for appellant.

G. W. Spahr, and *J. O. Spahr*, for appellees.

HOWARD, J.—This was an action, by the appellant, to recover judgment against the appellee, John H. Spahr, on a note given to appellant by said appellee, as part of the consideration for a half interest in a livery stable, owned by the parties at the time of said purchase.

The action also sought to set aside as fraudulent the subsequent sale and transfer of the livery stable by John H. Spahr to his wife and co-appellee, Sarah A. Spahr, and to subject the property so sold to the payment of any judgment that might be recovered by the appellant against John H. Spahr.

The court found for the appellant as against John H. Spahr; but found for the appellee, Sarah A. Spahr; thus, in effect, holding that she had purchased the livery stable from her husband in good faith and for a valuable consideration; that she had made the pur-

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chase with her own separate means, being property received by her from her father's estate; and that in such purchase there was no fraud or collusion on her part.

Against the judgment in favor of Mrs. Spahr, this appeal is brought; the error assigned being the overruling of appellant's motion for a new trial.

The reasons urged in favor of a new trial were: (1) That the court erred in excluding, as against Sarah A. Spahr, proof of the statement of John H. Spahr, while he was in possession of the livery stable as agent of his wife, and after the sale to her, to the effect, that he had made said transfer to his wife "to beat Higgins" (meaning the appellant); (2) that the finding and decision were not sustained by sufficient evidence; and (3) that the finding and decision were contrary to law.

It was said in *Daniels v. McGinnis, Admr.*, 97 Ind. 549, that "as a general rule, the declarations of a grantor, made after he has parted with his title, are not admissible in evidence to impeach the title of any one claiming under him. *Campbell v. Coon*, 51 Ind. 76; *Garner v. Graves, Admr.*, 54 Ind. 188; *Burkholder v. Casad*, 47 Ind. 418. There are exceptions to this rule. One of the exceptions is, where the grantor and grantee conspire together to defraud third persons. In such case the statement of either is admissible against the other. *Caldwell v. Williams*, 1 Ind. 405; *Tedrowe v. Esher*, 56 Ind. 445; *Kennedy v. Divine*, 77 Ind. 490; *Bump. Fraud. Conv.* (2d ed.), 566."

In *Tedrowe v. Esher, supra*, Perkins, C. J., speaking for the court, said: "The fact that the grantor remains in possession is a circumstance tending to show fraud, but it does not of itself alone, establish a conspiracy or combination between the grantor and grantee to defraud, so as to let in, as evidence,

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the declarations of the grantor, made after he has parted with his title, and in the absence of the grantee, impeaching the grantee's title. * * * As matter of practice in such a case as this, the court should not rule upon the admissibility of testimony such as was admitted and objected to in this case, till the other evidence in the case is in, that the court may make its ruling with knowledge whether a fraudulent combination is proved or not." It is to be noted that in the Tedrowe case, however, the property alleged to have been fraudulently conveyed, was real estate, and not, as in this case, personal property. See also *McCormicks v. Fuller and Williams*, 56 Ia. 43; *South Branch Lumber Co. v. Stearns*, 2 Ind. App. 7; 9 Am. and Eng. Ency. of Law, 347, note 1; 11 National Corp. Rep., 392.

In the case at bar, there was evidence tending to show that John H. Spahr had been, for many years, indebted to his wife's father, and that for this indebtedness he had given his promissory notes. There was also evidence tending to show, that on the death of Mrs. Spahr's father, these notes were turned over by the administrator to Mrs. Spahr, in the distribution, as a part of her share in the estate; and that it was in payment of the debt so created that the livery stable was sold to her by her husband, she receiving from him a bill of sale, and at the same time executing to him a written appointment as her agent to carry on the livery stable in her name.

Appellant, however, contends that the evidence merely shows that Mrs. Spahr's father made gifts or advancements to John H. Spahr, with her knowledge and consent; that it was not intended that John H. Spahr's notes, given in acknowledgment of such advancements, should ever be collected, unless her father should at some time, owing to adverse circum-

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stances, become in great need of the money; and that the notes were surrendered by the administrator simply that they might be canceled.

It must be admitted that the evidence of good faith in the sale of the livery stable by John H. Spahr to his wife, is not of an altogether satisfactory character; and had the finding of the court, on the evidence adduced, been against the fairness of that transaction, we could not, in the light of the decisions of this court, disturb such finding.

The facts in the case of *Geisendorff v. Eagles*, 106 Ind. 38, were, in some respects, much like those in the case at bar. There it was found that Geisendorff, being indebted to his wife in the sum of \$11,000.00, money derived from her separate estate, and appropriated by her husband in his own business, and being also insolvent and largely indebted to other persons, gave his wife a bill of sale of a large quantity of ice, and then took from her an appointment as one of her agents, and so continued in possession of the ice and in the carrying on of the ice business. The ice so sold to the wife was seized on execution, issued against the husband. In an action in replevin, brought by the wife to recover the ice from the sheriff, there was judgment for the execution plaintiffs.

The case was twice appealed to this court. On the first appeal, the court said: "The evidence on the trial clearly showed, we think, that * * * the said Jacob C. Geisendorff did sell such ice to his wife, the said Sarah H. Geisendorff, for its fair value, in payment of a debt then justly due and owing by him to her. This sale was made some time before the appellees, or either of them, acquired any interest in or lien upon such ice. It was clearly shown, however, that, after this sale of the property in question, there was

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no visible change in the possession thereof." *Geisendorff v. Eagles*, 70 Ind. 418.

On the second appeal, the holding was similar: That the indebtedness of the husband to the wife was clearly and satisfactorily established, and that his sale to her of the ice was in payment of this indebtedness. But the court also found that there was evidence tending to impeach the good faith of that sale, particularly that "no visible change of possession followed, and everything relating to the ice continued thereafter apparently as before." Consequently, the sale was held to be in fraud of creditors.

The sale in *Geisendorff v. Eagles*, *supra*, had fewer badges of fraud than are found in the case before us. In that case, there was no question that the consideration for the sale was good. Here, while the court, in effect, found the consideration good, and while there was evidence given on which such finding might be based; yet, it is strenuously contended, and with much reason, that the evidence of a valid consideration is of an exceedingly unsatisfactory character. Here, moreover, the painstaking legal formalities observed in the execution of the bill of sale and the appointment of the husband as agent, are suspicious circumstances, and as such are recognized badges of fraud. In both cases, the continued possession of the husbands, under their pretended appointment as agents of their wives, is quite similar. See, in addition, *Mitchell v. Sawyer*, 115 Ills. 650.

In *Seavey v. Walker*, 108 Ind. 78, a bill of sale of a stock of goods was given by one Lew to Seavey and another, in payment of certain valid debts. Lew, however, continued in possession of the goods and of the business connected therewith. The sale was held invalid, as being in fraud of other creditors.

The court, in that case, citing the statute, section

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6636, R. S. 1894 (section 4911, R. S. 1881), that "every sale made by a vendor, of goods in his possession or under his control, unless the same be accompanied by immediate delivery, and be followed by an actual change of the possession of the things sold, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith, unless it shall be made to appear that the same was made in good faith and without any intent to defraud such creditors or purchasers,"—held that the continued possession by Lew of the goods and business, after he had given a bill of sale of the same, made a case of presumptive fraud, and that it was incumbent on Seavey to disprove the *prima facie* case of fraudulent sale so made.

In the case at bar, we think also that a *prima facie* case of fraudulent sale by John H. Spahr to his wife was made out, on showing that Spahr continued in full possession and management of the livery stable and business after the giving of the bill of sale to his wife. This would seem evident, whether, as the court found, he afterwards proved the good faith of his sale or not.

This *prima facie* case of fraud having been made out by the appellant, the question arises, whether the court did not err in excluding evidence offered by him of the declaration of Spahr, while in possession of the property, that the sale was made "to beat Higgins."

"The general rule," as said in *Grant v. Lewis*, 14 Wis. 528, "is, it is true, that the declarations of a vendor, made after he has parted with his title, are not admissible in evidence to affect the title of the vendee. But an exception to this rule is so far established, that where the vendor remains in the actual possession of the goods, his statements explanatory of such possession and of the relation which he then holds to the property, are admissible as original evidence, and for

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the purpose of showing fraud in the sale if they have that tendency."

A like ruling was made in *Hamburg v. Wood & Co.*, 66 Tex. 168. There a *prima facie* case of fraudulent sale having been made by showing that the vendor remained in possession after the sale, and notwithstanding the claim made that evidence adduced showed that the sale was in fact made in good faith, the court said: "However reasonable may have been the explanation given in this case, whether it was sufficient to rebut the *prima facie* case made by the plaintiff, was to be passed upon by the jury. In refutation of that explanation, the plaintiff, by establishing a *prima facie* case of fraud, had laid the predicate for proof of the excluded declarations." And the court added: "The claim by both vendor and vendee that the possession by the former is as agent or servant of the latter, does not render the testimony inadmissible." As to effect of vendor's retention of possession after sale, see, further, a valuable note in Benj. Sales, section 675, note D.

Whether the decisions of this court go so far as the cases last cited, in holding that possession after sale by a vendor of personal property establishes a *prima facie* case of fraud, may, perhaps, be questioned; since our statute, *supra*, provides that the good faith of such sales may be established. Our statute, above quoted, does, however, throw upon the vendee of such property the burden of showing the good faith of such transfer of title. Besides, considering the many badges of fraud in the sale here under consideration, together with the unsatisfactory character of the evidence adduced in support of its good faith, we are inclined to think that the court erred in excluding the evidence offered to prove the declarations of John H. Spahr, made while still in possession of the property,

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to the effect that the sale was made to prevent the collection of the debt due the appellant. That debt was one of the most sacred recognized by law, being for the purchase-price of the same property sold by appellant to John H. Spahr.

The judgment is reversed, with instructions to grant a new trial.

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HOME ELECTRIC LIGHT AND POWER COMPANY v. THE GLOBE TISSUE PAPER COMPANY.

[No. 17,797. Filed May 27, 1896.]

JUDGMENT.—*Definition of Final Judgment.*—A final judgment is one which determines the rights of the parties in the suit, or a distinct and definite branch of it, and reserves no further question or direction for future determination.

SAME.—*Entry.*—*Appealable Judgment.*—An entry by the court, in a civil action, that it found defendant guilty of contempt of court and “now assesses a fine of \$100.00 against the defendant, reserving the right to remit all or any part of said fine at any time before the final disposition of this cause,” is not a final and appealable judgment.

From the Elkhart Circuit Court. *Affirmed.*

Dodge & Hubbell, and *Vanfleet & Vanfleet*, for appellant.

Baker & Miller, *Osborn & Zook* and *Chamberlain & Turner*, for appellee.

HACKNEY, J.—In a suit by appellee against the appellant, the latter was restrained from certain uses of the water-power, supplied to both companies by the St. Joseph Hydraulic Company.

While that suit was pending, and within a few days after the order so restraining the appellant, the appellee filed certain affidavits, in which the trial court was advised that the appellant had been guilty of con-

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tempt in violating said order. The appellant was permitted to file certain counter-affidavits, and the court made the following entry: "This matter having been submitted to the court upon the affidavits heretofore filed herein, by the respective parties, and the court being well advised in the premises, now finds the defendant, the Home Electric Light and Power Company, guilty of contempt of court, as charged, and the court now assesses a fine of one hundred (\$100.00) dollars against the defendant, reserving the right to remit all or any part of said fine at any time before the final disposition of this cause; to all of which defendant, at the time, by counsel, duly excepts. And the defendant now tenders its bill of exceptions number one." From this entry said Home Electric Light and Power Company has brought the record in said cause to this court, as upon appeal from a final judgment. The appellee challenges said entry as not constituting a final judgment from which an appeal lies, and the appellant attempts no answer to this proposition.

"A final judgment is one which determines the rights of the parties in the suit, or a distinct and definite branch of it, and reserves no further question or direction for future determination." 12 Am. and Eng. Ency of Law, p. 63, and cases cited; 1 Black. Judg., sections 21, 31, 46; *Thomas, Admr., v. Chicago, etc., R. W. Co.*, 139 Ind. 462; *Needham v. Gillaspie*, 49 Ind. 245.

Here there is no order for the recovery of any sum, and no adjudication as to costs, nor is it apparent that the court intended the entry as anything further than a finding, since the privilege "to remit all or any part" of the fine is reserved. Treating the proceeding as in the nature of criminal proceedings, and the recovery being a fine, the judgment would be in the name of and enforceable by the State of Indiana. If the entry

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in question were a judgment, it would not only preclude a remittitur by the trial court, but would take on that character without any order for payment, and without including a payee. If it were in the nature of a civil proceeding it would not direct the payment for the benefit of any person or corporation; "a fine" would be but the equivalent "damages," and would, therefore, be nothing more than a finding without any order of recovery. As such it would not be a final judgment. *Needham v. Gillaspy, supra.*

In our opinion, the entry in question is not a final judgment, and no appeal lies.

The appeal is dismissed.

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[No. 17,729. Filed Feb. 14, 1896. Rehearing denied May 27, 1896.]

CRIMINAL LAW.—*Perjury.—Affidavit and Information.—Repugnancy.*

—When on affidavit and information a person is prosecuted for perjury, the affidavit charging the perjury to have been at the trial of a cause on the 26th of September, 1893, and the information alleges that the cause, at the trial of which the perjury was committed, was pending in the circuit court on the 26th of September, 1889, and that the perjury was committed on the 26th of September, 1893, a motion to quash, on the ground of repugnancy between the affidavit and information, and on the ground of repugnancy in the allegations of the information, is properly overruled.

JUDGE.—*Appointment of Special Judge.*—Only a regular judge may appoint a special judge in his place.

SAME.—*Appointment of Special Judge.—Attorney.*—When a regular judge for any reason is disqualified from sitting in any cause, he is authorized under section 1839, Burns' R. S. 1894, to appoint any competent disinterested attorney of this State as special judge, if in his opinion another regular judge cannot be readily obtained.

CHANGE OF VENUE.—*Perjury.—Discretion of Court.*—Where, in a prosecution for perjury, the defendant applies for a change of venue from the county, under section 1840, Burns' R. S. 1894, whether it shall be granted or not, is a matter that rests in the sound discretion

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of the court ; and the exercise of that discretion will not be reviewed unless it has been clearly abused.

APPEAL AND ERROR.—*Bill of Exceptions.*—*Longhand Manuscript.*—*Evidence.*—The act of March 7, 1873 (Acts 1873, Reg. Sess., 194), requiring that the longhand manuscript of evidence to be used on appeal shall be filed with the clerk before it is incorporated into the bill of exceptions, is still in force.

QUERY.—Whether or not the act of March 10, 1875 (Acts 1875, 187), is constitutional.

From the Huntington Circuit Court. *Affirmed.*

Kenner & Lesh, and Cobb & Hart, for appellant.

W. A. Ketcham, Attorney-General, E. S. Kelsey, W. F. Dinins, and Branyan & Branyan, for State.

HOWARD, J.—On affidavit and information, the appellant was convicted of perjury, and sentenced to imprisonment in the State's prison.

It is first urged that the court erred in overruling the motion to quash the first count of the affidavit and information, under which the conviction was had. The reason given for this contention is that there is repugnancy between the affidavit and information, as to the date of the offense charged; and also that there is repugnancy in the allegations of the information itself.

The affidavit charges that the perjury was committed, at the trial of a certain cause in the Huntington Circuit Court, "on the 26th day of September, 1893." This date appears twice in the affidavit with the first count of the information, and twice also in the affidavit with the second count; and no other date is named in either affidavit.

In the first clause of the information it is stated that the action, in the trial of which it is alleged that the appellant committed the act of perjury, was pending in said court "on the 26th day of September, 1889."

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In a subsequent clause of the information, and that in which the particulars as to the alleged false testimony of appellant are set out, the date of the trial, being also the date of the alleged perjury, is stated as follows: "And said issue being duly joined in said cause between the said claimant and the said estate, and the said petit jury of twelve men being duly impaneled and sworn to try said cause, and said cause was so tried in the Huntington Circuit Court on the 26th day of September, 1893; and said issues were tried by said court and jury, in due form of law, and he, the said John W. Smith, was called as a witness by the claimant and plaintiff in said cause, and was duly sworn in due form of law as such witness." The testimony given by the witness, and alleged to have been false, is then set out in detail in the information.

The date of the trial and of the alleged perjury, September 26, 1893, being the last date named in the information, agrees with the dates stated in the affidavit. The first date named in the information, that on which it is alleged the action was pending, September 26, 1889, we are satisfied, is a mere clerical error. Yet, even if the action were in fact pending on September 26, 1889, that circumstance would not be inconsistent with the fact of the trial of the cause, and the commission of the act of perjury on September 26, 1893. Besides, the first date, in the information, together with all the words and phrases relating to it, may be omitted as surplusage, and we shall have left, as said in *State v. White*, 129 Ind. 153, "sufficient to indicate the crime and person charged substantially in the language of the statute." Section 2093, R. S. 1894 (section 2006, R. S. 1881). See also *Drake v. State*, *Post*, 210.

As to repugnancy claimed to exist among the allegations of the information itself, we think, after a

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careful reading of the information, that it is clear to a common intent, and that appellant could have suffered no harm from any irregularities of language contained in it. The crime of perjury is substantially well charged; and the statute forbids the quashing of an indictment or information, among other defects, "for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged." Section 1825, R. S. 1894 (section 1756, R. S. 1881); *McCool v. State*, 23 Ind. 127; *Wall v. State*, 23 Ind. 150; *State v. Patterson*, 116 Ind. 45.

What we have said as to the motion to quash the information, is equally applicable to the motion in arrest of judgment. Both motions, as we think, were properly overruled.

Several errors are assigned and discussed as to the appointment of judges to try the cause. The Hon. C. W. Watkins, the regular judge, having been of counsel in the case, called the Hon. J. T. Cox, judge of the Fifty-first Judicial Circuit, to try said cause, and all other causes that might be brought before him while "acting as special judge of this court." After Judge Cox assumed jurisdiction of the case, the appellant filed a motion and affidavit for a change of judge on account of bias and prejudice. On the granting of this motion, the appellant requested Judge Cox to call a special judge to hear the cause, but Judge Cox refused to call another judge, for the reason that, being himself an appointee, he had no authority to appoint another judge, that such authority could be exercised only by the regular judge. This refusal of Judge Cox to appoint another special judge, and the action of Judge Watkins, the regular judge, in taking the bench and making such appointment of a second special judge, was, we think, in strict compliance with the statute. Only a regular judge may appoint a special

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judge in his own place. Section 1447, R. S. 1894; 2 Gav. & H. 10; 2 Davis, R. S. 1876, 11; Acts 1855, 62; *Burrell v. State*, 129 Ind. 290; *Glenn v. State, ex rel.*, 46 Ind. 368; *Cargar v. Fee*, 119 Ind. 536, and 140 Ind. 572.

But, even if our decisions had not so ruled, still, in this case, as Judge Cox refused to appoint another special judge, and the jurisdiction of the cause remaining in the Huntington Circuit Court, the regular judge of that court would have the right to appoint some one to try the cause. This would be required by public policy. *Singleton v. Pidgeon*, 21 Ind. 118.

Complaint is also made that even if Judge Watkins had power to appoint the second special judge, he ought to have called another regular judge, and not have appointed an attorney to try the cause. The statute, section 1839, R. S. 1894 (section 1770, R. S. 1881), leaves the appointment in such case to the discretion of the judge, providing only that "if it shall be difficult, in the opinion of the court, for any cause, to procure the attendance of such judge," then "any competent and disinterested attorney of this State, in good standing," shall be appointed to try the cause. Judge Watkins, in making the appointment complained of, said: "In the opinion of the court such regular judge cannot be readily obtained." And counsel do not question but that the attorney appointed was competent, disinterested, and in good standing. This would seem to show that the appointment was fully authorized. Under section 1447, R. S. 1894, already cited, the appointment complained of might also have been made.

Complaint is made that the court overruled the motion for a change of venue from the county. It is provided in section 1840, R. S. 1894 (section 1771, R. S. 1881), that "When the affidavits are founded upon excitement or prejudice in the county against the de-

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fendant, the court, in all cases not punishable by death, may, in its discretion, and in all cases of felony punishable by death shall grant a change of venue to the most convenient county."

On the ruling here complained of, we may say, as was said by Judge Worden, in *Mershon v. State*, 44 Ind. 598: "There was an affidavit of the appellant, supported by affidavits from others, for a change from the county; but counter-affidavits were filed, and, although a strong case was made for a change, we can not say that there was such an abuse of discretion in overruling the motion as to amount to error. Where the application is for a change from the county, whether it shall be granted or not is a matter that rests in the sound discretion of the court; and the exercise of that discretion will not be reviewed here, unless it has been clearly abused. *Fahnestock v. State*, 23 Ind. 231."

It is finally contended that the court erred in overruling appellant's motion for a new trial. Counsel for the State, however, say that this assignment of error is unavailable, for the reason, as they contend, that the bill of exceptions containing the evidence is not in the record. The basis for this contention is that the longhand manuscript of the evidence was not filed in the clerk's office before it was incorporated in the bill of exceptions, contrary to the requirement of the statute. Section 1476, R. S. 1894 (section 1410, R. S. 1881).

The certificate of the judge shows that the bill of exceptions was presented to him and signed August 13, 1895; while the certificate of the clerk shows that the longhand manuscript of the evidence, and also the bill of exceptions, were not filed in his office until August 14, 1895. It is the rule, as required by said statute, and as firmly fixed by the decisions of this

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court, that the longhand manuscript copy of the evidence, as taken down by the shorthand reporter, shall be filed in the clerk's office before it is incorporated in the bill of exceptions. *Holt v. Rockhill*, 143 Ind. 530, and *DeHart v. Beard, etc.*, 143 Ind. 363, and authorities cited in those cases.

Counsel for appellant say, in answer, that said section 1476, R. S. 1894 (section 1410, R. S. 1881), providing for the filing of the longhand manuscript in the clerk's office, and its incorporation in a bill of exceptions, is invalid as applied to Huntington county. They say that said section was originally enacted as section 6 of an act entitled, "An act authorizing the appointment of shorthand reporters for certain courts of record in this State (in counties containing a population of 70,000, or more), and prescribing their duties, and compensation of such reporters." (Approved March 10, 1875. Acts 1875, 137.) That Huntington county does not contain a population of 70,000, as this court knows, and therefore the act in question, including said section 1476, R. S. 1894 (section 1410, R. S. 1881), being section 6 of said act, has no application to a cause tried in the Huntington Circuit Court.

This, we believe, is the first time that the validity of the statute here assailed has been questioned in this court. It must be admitted that the position assumed by counsel would seem to be well taken, and that the act of March 10, 1875, could apply only in the courts of counties having 70,000 inhabitants or more. Query. Whether such act is not local or special, and so, with its numerous amendments, invalid, as in violation of section 22 of Art. 4, of the constitution, forbidding local or special laws "regulating the practice in courts of justice?"

But while section 1476, R. S. 1894 (section 1410, R. S. 1881), although brought into the revised statutes as

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section 6 of the act of March 10, 1875, may, therefore, together with the whole act of which it is a part, as well as its several amendments, be invalid; yet, as will be found on examination, the provisions contained in said section, are the same as those contained in another act, which is still in force, and which latter act applies to the courts of all counties in the State.

In section 1 of an act entitled "An act concerning the employment of shorthand reporters, regulating their duties, and providing that the original longhand manuscript report of evidence may be used on appeal in certain cases," approved March 7, 1873, Acts 1873, Rg. Sess. 194, we find contained, in full and in the exact language, all the provisions of section 1476, R. S. 1894 (section 1410, R. S. 1881). This act of March 7, 1873, so far as we can learn, has never been repealed or amended, and is yet in full force and effect. *Galvin v. State, ex rel.*, 56 Ind. 51.

As to the further contention of counsel, that it was held by this court, in *Hull v. Louth, Gdn.*, 109 Ind. 315, that "where the longhand manuscript of the evidence is "where the longhand manuscript of the evidence is filed with, and as a part, of the bill of exceptions, that is a sufficient filing," it may be said that such holding was, in effect, disapproved and said case overruled to that extent in the more recent cases of *Holt v. Rockhill*, and *DeHart v. Board, etc.*, *supra*.

The bill of exceptions is therefore not a part of the record, and the questions raised in the motion for a new trial cannot be considered.

The judgment is affirmed.

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ORTH ET AL. v. ORTH ET AL.

[No. 16,498. Filed November 26, 1895. Rehearing denied May 28, 1896.]

WILL.—*Letter to Beneficiary.*—Where a husband by his last will makes his wife his sole beneficiary, a letter to her in reference to the disposition of his property, not being attested as required by statute, is not of a testamentary character.

SAME.—*Letter to Beneficiary.—Trust.*—Where a testator makes his wife his sole and absolute beneficiary, a letter to her, of the same date as the will, informing her of the terms of the will, advising her as to the management of the estate and expressing a hope that she would deed certain real estate to a person named, and that she would have sufficient after paying all debts to assist his children as they might need from time to time, and expressing full confidence that she would act justly toward all, closing with a desire that she should have a competence during life and that she would give what remained equally to his children, does not create an enforceable trust in favor of the children.

SAME.—*Parol Promise of Beneficiary.—Constructive Trust.—Trust Ex Maleficio.*—The violation of a parol promise by the sole and absolute beneficiary to the testator, to carry out his wishes, expressed in a letter written to the beneficiary by such testator, is not such a fraud as will create a trust *ex maleficio*.

SAME.—*Parol Promise of Beneficiary.—Statute of Frauds.*—A parol promise to a testator by the sole beneficiary of his will to give certain property to another person is void so far as it involves the transfer of real estate, or of personal property in a sum greater than \$50.00.

SAME.—*Equity.—Executory Parol Trust.*—Equity will not enforce, in behalf of a mere volunteer, an executory parol trust.

From the Carroll Circuit Court. *Affirmed.*

G. Burry, Palmer & Spencer and Gould & Eldridge, for appellants.

Wallace & Baird, for appellees.

HACKNEY, C. J.—The late Honorable Godlove S. Orth, by his last will, devised and bequeathed to Mary Ann Orth, who was his second wife, all of his real and

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personal property, without condition, reservation, or limitation. Bearing the date of said will and accompanying the same was this letter from the testator to his said wife:

"To My Dear Wife—Among my papers you will find my will of this date. I give and bequeath to you all my property, real and personal. I do this because it will greatly facilitate the settlement of my estate, will tend to save unnecessary costs and expenses and will give you, if properly managed, a competence during your life, and something for each of the children, Will, Mollie, and Hal thereafter.

"After the payment of all my debts, I trust you will have sufficient left to assist all my children as they may need from time to time, without, however, endangering your own support, and I have full confidence that you will act justly toward all.

"Unfortunately, as you know, I am heavily in debt, but by prudent management, I think, you can save our Benton county farms, or at least the 640 acres, being in section 12, and selling, if necessary, the two eighty-acre tracts in section 1. The two houses occupied by W. M. Orth and Jos. Ewing, are now held by us jointly, and on my death will become your property without the will. I should like very much, and hope you will, as soon as you find you can safely do it, make a deed to my granddaughter, Lizzie Ray Orth, for the house now occupied by her father, this will furnish them with a home.

"Our land in Bollinger county, Missouri, is also held by us jointly, and after my death will belong to you without the will. Some of my creditors may want their money sooner than you can realize by sale of property; in such event, I advise you to borrow money, by giving mortgage on some of my property, but I would advise you not to mortgage your own property

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for any such purpose. Unless I am much mistaken, the rents from the city property and farms will always be more than sufficient to pay taxes and interest on my debts, but, of course, it will be good policy to sell property as fast as you can conveniently, without sacrifice, and apply proceeds to the payment of my debts. Whenever you can sell any of your own property, especially that which is unproductive, I advise you to do so, and apply proceeds to the payment of my debts, thus relieving the property, which by the will becomes yours, of the debts against the same. I do not think it necessary to administer on the estate, you can settle without it I think. But should it become necessary, you can take out letters yourself, or join some good friend with you. You will need advice. Hal will, of course, be on hand, besides others whom you may regard as trustworthy. Do not pay my debts until a full examination, for it might so happen that claims will be presented through mistake or otherwise, or without proper credits allowed. In my papers you will generally find receipts and memoranda in reference to all my business affairs. Have all these carefully examined. In a word, act carefully, prudently, and under such good advice as you can procure, and act justly towards yourself and towards all my children, and I shall be content. My desire in this matter is that all my debts be paid, that you have a competence during your life, and then, what is left give to all the children alike. Farewell. GODLOVE S. ORTH."

In December, 1882, he departed this life, leaving surviving him his widow, said Mary Ann Orth, who elected to take under the will, Harry A. Orth, and Mary Orth McNutt, his children by said Mary Ann, and William M. Orth, a son by his former wife. Since the death of the testator said Mary Ann Orth and William M. Orth have departed this life intestate; Harry

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A. Orth is administrator *de bonis non*, with the will annexed, of the estate of said testator, and is administrator of the estate of said Mary Ann Orth; William M. Orth left surviving as his only heirs, the appellants, Eliza Gertrude Orth, his widow, and Lizzie Ray Orth, his daughter, and the appellant Spencer is administrator of said William's estate.

Said appellants instituted this suit, in eight paragraphs of complaint, against the appellees, Mary Orth McNutt and Harry A. Orth personally, and as administrator of said two estates of his father and his mother. Harry A. Orth and Mary Orth McNutt severally demurred to each paragraph of the complaint, stating as causes of demurrer that neither paragraph stated facts sufficient to constitute a cause of action, and that several causes of action were improperly joined. Harry A. Orth, in his capacity as administrator *de bonis non*, demurred separately to each paragraph of complaint, stating as causes of demurrer a want of sufficient facts, a want of jurisdiction over his person, and a want of jurisdiction of the subject-matter of the action. Pending the demurrers, the plaintiffs dismissed their action as to the estate of Mary Ann Orth, and thereupon the court sustained said several demurrers to the several paragraphs of complaint. Upon that ruling arise the only questions for review.

The first paragraph of complaint alleged the execution of the will and of said letter, both of which were exhibited by reference, and alleged that Mary Ann Orth knew the contents of said letter, and promised said Godlove to carry out the requests and intention expressed in said letter; that said Godlove, during his last illness, would have made other provisions in favor of said William, but that Mary Ann, Harry A., and Mary O., conspired to deprive William

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of any interest in the estate, and did, by promises and protestations, dissuade said Godlove from making changes in his will, and that they did, during his last sickness, exclude from his room and bedside the friends of William, and persons who might secure a change in said will; that, a few days before his death, said Godlove called to his bedside his said wife and his three children, and in the presence of each and all of them had said wife and said children, Harry A. and Mary O., to promise to carry out the wishes expressed in said letter. It is also alleged that parts of the estate were converted by Mary Ann Orth and parts were made over to and converted by said Harry A. and Mary O.; that Mary A., when executrix, and Harry A., as administrator *de bonis non*, made no inventory and no accounting to the court of the assets of the estate, or any disposition of the same. An accounting and partition are prayed upon the theory that the letter and the oral promises created a trust in favor of William M. in the property of the estate of his father.

The second paragraph alleges substantially the same facts, but adds that after the death of Godlove S. Orth, his widow, Mary Ann Orth, stated to William M. Orth that she was intending and endeavoring to treat all the children alike, according to the expressed wishes of his father; that, pursuant to that expressed intention and her promise, she procured a will to be written, which, to some extent, would carry out such wishes; that said Harry A. and Mary O., further contriving to defraud William of that portion of the estate of his father, which, after the death of Mary Ann would rightfully belong to him or his heirs, by importunities, and by appealing to the maternal feeling of said Mary Ann Orth in an improper manner, before and during her last sickness, postponed from

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time to time the execution of such will until Mary Ann Orth died without making provision for said William. By this paragraph damages are sought.

The third paragraph differs from the first in alleging a promise by Mary Ann Orth to William Orth, after the death of Godlove S. Orth, to carry out the wishes expressed in said letter, and frequent requests by William M. that she do so, and that she died, having neglected to comply with that promise. Damages are claimed by this paragraph.

The fourth paragraph pleads the facts alleged in the second paragraph, but upon the theory of a trust, as in the first paragraph, seeks an accounting and partition.

The fifth paragraph alleges substantially the facts pleaded in the first, second, and third paragraphs, and demands an accounting and partition.

The sixth paragraph differs from the third in alleging that the promise of Mary Ann Orth to William M., to carry out the wishes of his father, as expressed in said letter, was induced by a threat of said William to sue her for the enforcement of his claim, and that by reason of her said promise and in consideration thereof he desisted from suing as he had intended. An accounting and partition were prayed.

The seventh paragraph alleged the facts of the sixth, and, instead of an accounting and partition, sought damages.

The eighth paragraph was the same as the sixth, omitting the allegation that William M. Orth withheld suit in consideration of the promise of Mary Ann Orth to provide for him, and that she had died without executing her will. In addition to the facts pleaded in the sixth paragraph, it was alleged that Harry A. and Mary O. wrongfully converted to themselves the property of Godlove S. Orth remaining at

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the death of Mary Ann Orth. The demand was for damages.

The complaint covers ninety pages of typewritten legal cap, and the paragraphs differ so slightly that we have deemed it advisable to state them briefly, rather than to set them out at length.

Our statute of wills, section 2746, R. S. 1894, provides that "No will except a nuncupative will shall affect any estate, unless it be in writing, signed by the testator, or by some one in his presence with his consent, and attested and subscribed in his presence by two or more competent witnesses." It would seem unnecessary to remark that this provision is wise, in its purpose to require the solemn and almost sacred disposition of property by testament, to exclude unauthentic writings, the possible subjects of forgery, and evidence of parol declarations of devise and bequest, the possible subjects of false testimony. The letter of the testator, if it contained testamentary words, has not the attestation required by the statute, to entitle it to recognition as his will, nor does it carry even the force of recognition by any reference from within the lines of the will. It is not acknowledged, as required in the case of deeds, even if that should be sufficient, and has no other authentic protection from the rule guarding against forged instruments of title. We do not regard the letter as of a testamentary character. See *McCarty, Admr., v. Waterman*, 84 Ind. 550; *Moore, Treas., v. Stephens, Exr.*, 97 Ind. 271. Indeed, we do not understand counsel to insist that by it William M. Orth became a devisee or legatee, but it may, possibly, be considered in determining the intention of the testator in the provisions made by his will. *Copeland, Exr., v. Summers*, 138 Ind. 219. In so receiving it, however, we should be mindful of the rule that the authentic

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provisions of the testament itself are recognized by the statute as the most worthy source of information as to the testator's intention, and that where the intention there manifested is without uncertainty or doubt, we should be slow to permit doubt or uncertainty to thrust itself into the will and thwart that clearly expressed and otherwise certain intention.

The only disposition of property, made by the will, was in the following language:

"I do hereby devise and bequeath to my wife, Mary Ann Orth, in fee-simple, all and singular, my real estate, of whatsoever nature or description, situate in Tippecanoe, Benton, and White counties, Indiana, all of my real estate in the states of Iowa and Missouri, or wheresoever else situated and of which I may die seized or possessed.

"And I do further give, devise and bequeath to my wife, Mary Ann Orth, absolutely, all of my personal estate, of whatever nature or description, which may be owned by me at the time of my death. I hereby grant to my said wife full power, either with or without administration on my estate, to collect all my debts and chooses in action, and to do whatever may be necessary in the final settlement of my estate, hereby enjoining upon her to pay all just debts and liabilities as soon after my death as may be.

"Should administration on my estate be necessary or desirable, I hereby appoint my said wife executrix of this, my last will and testament, giving her authority to associate one or more persons with her in the execution of this trust.

"I desire all my dear children to know and feel that this disposition of my estate is, in my judgment, the best under all the circumstances surrounding it—knowing that they will find my said wife as much disposed to love and care for them, and to deal justly

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by them, as I have always felt and acted toward them myself."

It would be difficult, if not impossible, to conceive or to reduce to words a more sweeping and unfettered disposition of property, or a clearer or more certain designation of the object of the bounty. Mary Ann Orth was given, in fee-simple, all of the real estate, and was given, absolutely, all of the personal property. Considering the letter as if it followed these unambiguous declarations of intention to vest in the wife the fullest title known to the law, and we will determine its legal and equitable effect. We have already seen that it does not arise to the standard of a testament, and we are now to look at it, to ascertain if it bespeaks the testator's intention to have encumbered the devise and bequest with a trust in favor of his children. Almost the first words of the letter, which is addressed to his wife, are: "I give and bequeath to you all my property, real and personal." She is advised of his financial embarrassment, and, in a practical, thoroughly business-like course, she is advised how to take the best advantage of the embarrassment. In this advice the intention is repeated that her title and holding is unqualified, for he suggests that of her property, not received by devise, she sell that which is unproductive, paying his debts with the proceeds, and "thus relieving the property which, by the will, becomes yours." There is no word of command in the letter, but its tone is entirely advisory. True, there are expressions of hope, of confidence, and of request. The hope is that his indebtedness may not sweep away the estate and leave the wife without support during her life, without means to help his children from time to time, as they may need it, and without something which she may, at the end, give to his children. The

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confidence that she will so help his children from time to time, and finally, "what is left give to all the children alike." The request that she convey to William's daughter, Lizzie Ray Orth, as a home for William's family, a house and lot belonging to the wife independently of the will.

There is not a syllable expressing the intention to charge the estate devised with an enforceable, legal or equitable trust in favor of the children. There is that which, from various expressions, denotes a confiding trust in the wife that she will deal fairly, justly, and equitably with his children. That trust raises but a moral obligation, and creates no interest in the property in favor of the children, and does not burden the absolute title given by the will to the wife. In 1 Lewin Trusts (ed. 1888), page 135, it is said: "Where both objects and property are certain, yet no trust will arise, if the testator expressly declare that the language is not to be deemed imperative, or the construing it a trust would be a contradiction to the terms in which the preceding bequest is given; or, if, all the circumstances considered, it is more probable that the testator meant to communicate a mere discretion; * * * * or if a testator give the property to his wife, 'well knowing her *sense of justice and love of family*, and feeling perfect confidence that she will manage the same to the best advantage for the benefit of the children;' or, 'to be used by her in such ways and means as she may consider best for her own benefit and that of my three children;' or, 'feeling confident that she will act justly to our children in dividing the same when no longer required by her' or, 'in full confidence that she will do what is right as to the disposal thereof between my children, either in her life time, or by will after her decease;' or, 'to be at her

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disposal in any way she may think best for the benefit of herself and family;' or, 'to his wife absolutely, with full power for her to dispose of the same as she may think fit for the benefit of his family, having full confidence that she will do so.' " We cite in support of the text the following decisions: *Harper v. Phelps*, 21 Conn. 256, 257; *McCreary v. Burns*, 17 S. Car. 45; *Colton v. Colton*, 21 Fed. Rep. 594; *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572; *Howard v. Carusi*, 109 U. S. 725; *Hopkins v. Glunt*, 111 Pa. St. 287; *McIntyre v. McIntyre*, 123 Pa. St. 329; *Rose v. Porter*, 141 Mass. 309.

There should be no confusion of the expression of the testator of confidence that his wife, at her death, would provide for the children, with the absolute devises and bequests of the will so as to possibly imply a life-estate rather than a fee-simple in the wife. No such contention is made by the appellants, but the one inquiry arising from the letter is: does it point a trust in the property devised, or bespeak the testator's intention to raise a trust in favor of his children? Very clearly, we think, it does not. But, while considering it as if a part of the will, suppose its terms were more obscure and doubtful than we have regarded them, and that they should make the question doubtful as to whether the testator intended to narrow the otherwise free and unfettered devise and bequest. Our duty would then be to disregard the doubt and adhere to the clearly expressed provisions as indicating the intention of the testator. As said in the recent case of *Ross v. Ross*, 135 Ind. 367: "Where an estate in fee is devised in one clause of a will, in clear and decisive terms, it cannot be taken away or cut down by raising a doubt upon a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving

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the estate in fee. *Bailey v. Sanger*, 108 Ind. 264; *O'Boyle v. Thomas, Trustee*, 116 Ind. 243."

The case of *Fullencider, Admr., v. Watson*, 113 Ind. 18, involves the two questions as to considering the effect of words of recommendation, and excluding those merely casting doubt upon provisions otherwise clearly made. There the will gave to the wife, by decisive words, the personal estate, but followed the words of bequest with the following: "to have, use and enjoy the same as she may choose, and to dispose of the same in such manner as she may desire; yet I request that if, at the time of her decease, any of the personal property shall remain undisposed of, it be given to the children of my son * * and the children of my daughter * *." This court said of the bequest: "We are very far within the authorities when we affirm the proposition that, where a bequest of personal property, without limitation to life or a particular use, is made, and is accompanied by an absolute power of disposition, the first taker takes the whole interest. It has been for centuries the rule that, where the whole estate is absolutely devised, a repugnant condition must yield. *Allen v. Craft*, 109 Ind. 476. But here there is no condition, for the words employed are words of recommendation, not words of condition or restriction, and the case is within the rule declared by the adjudged cases. *Van Gorder v. Smith*, 99 Ind. 404, and cases cited; *Stowell v. Hastings*, 59 Vt. 494, 59 Am. Rep. 748; *Howard v. Carusie*, 109 U. S. 725; *Knight v. Knight*, 3 Beavan, 148; 2 Story Eq. Jur., section 1070."

Considered as a rule for ascertaining the intention of the testator, there is no room to distinguish between bequests of personal property and devises of real estate. The force of the letter, in the creation of a trust, certainly gains no strength by considering it apart from the will, where it must stand, and where,

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as we have said, the courts should be slow to accept it in the face of the Statutes of Wills, ~~of Trusts~~, and of Frauds, as impairing the force of solemn testamentary provisions, made in conformity to the statutes. Appellants' learned counsel strenuously insist that they do not set up the letter as creating the trust upon which they rely, but insist that the trust which they would enforce, and for the violation of which they seek damages, is a trust *ex maleficio*, or, a constructive trust, arising from the fraudulent conduct of Mrs. Orth subsequent to the execution of the will.

The position of counsel is stated by them in a quotation, supplemented by the authorities they cite, which we take from their brief:

"Where a person, knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise, or undertaking, it is in effect a case of trust; and in such a case the court will not allow the devisee to set up the statute of frauds—or rather the statute of wills, by which the statute of frauds is now, in this respect, superseded; and for this reason the devisee, by his conduct, has induced the testator to leave him the property; and, as Lord Justice Turner says, in *Russell v. Jackson*, no one can doubt that, if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this the court does not violate the spirit of the statute; but for the same end, namely, prevention of fraud, it engrafts the trust on the devise, by admitting evidence which the statute would in terms exclude, in order to prevent

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the party from applying the property to a purpose foreign to that for which he undertook to hold it.” (1636) *Rockwood v. Rockwood*, 1 Cro. Eliz. 164; (1678) *Chamberlaine v. Chamberlaine*, Freeman Ch. 34; (1684) *Thynn v. Thynn*, 1 Vern. 295, 296; (1689) *Devenish v. Baines*, 1 Ch. Prec. 3; (1705) *Oldham v. Litchford*, 2 Vern. 506; (1747) *Drakeford v. Wilks*, 3 Atk. 539; (1748) *Reech v. Kennegal*, 1 Ves. Sr. 122, 123; S. C. C. 1 Amb. 67, 1 Wils. 227; (1796) *Barrow v. Greenough*, 3 Ves. Jun. 151, 152; (1798) *Byrn v. Godfrey*, 4 Ves. Jun. 6, 10; (1804) *Stickland v. Aldridge*, 9 Ves. Jun. 516; (1812) *Paine v. Hall*, 18 Ves. Jun. 475; (1813) *Chamberlain v. Agar*, 2 Ves. & B. 259; (1836) *Podmore v. Gunning*, 7 Sim. 644; (1852) *Russell v. Jackson*, 10 Hare 198, 204, 211; (1855) *Wallgrave v. Tebbs*, 2 Kay & J., 313, 321-2; (1856) *Tee v. Ferris*, 2 Kay & J. 357; (1861) *Moss v. Cooper*, 1 J. & H. 352, 366; (1869) *Jones v. Badley*, L. R. 3 Eq. 635, 652; (1869) *McCormick v. Grogan*, L. R. 4 Eng. & I. Appls. 82; (1870) *Springett v. Jennings*, L. R. 10 Eq. 487, 495; (1878) *Rowbotham v. Dunnett*, 8 Ch. Div. 430, 436; (1884) *Boyes Case*, 26 Ch. Div. 531, 535; (1826) *Owing's Case*, 1 Bland. 370; (1832) *Hoge v. Hoge*, 1 Watts 163, 215, 216; (1868) *Barrell v. Hanrick*, 42 Ala. 60, 73; (1870) *Caldwell v. Caldwell*, 7 Bush 515; (1874) *Dowd v. Tucker*, 41 Conn. 197; (1884) *O'Hara v. Dudley*, 95 N. Y. 403; (1888) *Gilpatrick v. Glidden*, 81 Me. 137; (1890) *Gruves v. Graves*, 9 N. Y. Sup. 145; (1890) *Ragsdale v. Ragsdale*, 8 S. R. 315; (1892) *Larmon v. Knight*, 29 N. E. Rep. (Ill. Sup.) 1116; *Gaither v. Gaither*, 3 Md. Ch. 158, 160; *Church v. Ruland*, 64 Pa. St. 432; *Vreeland v. Williams*, 32 N. J. Eq. 734; *Glass v. Hulbert*, 102 Mass. 24, 39, 40; Browne St. Frauds, p. 3, section 93;

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Towles v. Burton, Rich Eq. Cases, 146; *Jones v. McKee*, 3 Pa. St. 496, 497, 6 Pa. St. 425; *Schultz Appeal*, 80 Pa. St. 396; *Williams v. Fitch*, 18 N. Y. 546; *Campbell v. Brown*, 129 Mass. 23, 26; *Socherr's Appeal*, 104 Pa. St. 609; *Piper v. Hoard*, 107 N. Y. Rep. 67, 82; *Richardson v. Adams*, 10 Yerg. 273; *Hooker v. Axford*, 33 Mich. 453; *DeLaurencel v. DeBoom*, 48 Cal. 581, 585; *Kennedy v. Kennedy*, 2 Ala. 571; *Brook v. Chappell*, 34 Wis. 405; *Thomson's Lessee, etc., v. White*, 1 Dallas 424; *Cox v. Arnsmann*, 76 Ind. 210, 212, 213; *Browne v. Browne*, 1 Har. & J. 430.

If the position so assumed were correct, and if the authorities cited could be held to apply, under the the statutory provisions in this State concerning wills, trusts, and frauds, questions upon which we now venture no opinion, it is, nevertheless, true that, upon the allegations of any paragraph of the complaint, the letter is read to define the limits and character of the trust. It is from the letter that the subject of the trust insisted upon is to be taken; it is from the letter that the objects of the trust must be learned; it is from the letter that the time and manner of performance of the trust shall be determined, if at all. No promise of Mrs. Orth to her husband is alleged which did not have reference to his wishes, as expressed in the letter. No promise of Mrs. Orth to William is alleged, which did not have reference to the wishes of his father as expressed in the letter. The alleged promises to William, after the death of his father, however, do not constitute an element in the creation of a trust, if a trust was created, but, from the standpoint of the appellants, may, possibly, be considered in determining whether Mrs. Orth violated the alleged promises to her husband.

The important question, involving the letter, is as

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we have said, that it must be accepted as defining the scope of the trust claimed. The oral promises constituting the alleged fraud, the essence of the trust *ex maleficio*, considered apart from the letter would be meaningless, since those promises were but generally to carry out the wishes expressed in the letter. The alleged oral promises, without the letter, do not define the extent of the property to be regarded as the subject of the trust, nor the interest to be held for the several alleged beneficiaries, nor the time when the trust obligations should be discharged. In a word, there was nothing definite, in the conversation alleged, as to any element of a trust, unless, possibly, it was as to the persons hoped to be benefited. If we are correct in our conclusions that the letter raises no trust, and does not limit or qualify the absolute devise and bequest to Mrs. Orth; if it gives to the appellants no legal or equitable interest in the property, and does not supply the alleged trust, as appellants expressly affirm in their able briefs; and if it must be looked to as defining the trust claimed to arise from the alleged fraud of Mrs. Orth, we find that the same uncertainty and indefiniteness attends the alleged trust *ex maleficio* with the letter as without it. We apprehend that authority should not be required to support the proposition that a trust, whether declared or arising from conduct, which does not, with reasonable certainty, point the essential elements of a trust, is no trust at all.

The rule stated by Lewin, page 56, is: "Nor will the trust be executed if the precise nature of the trust cannot be ascertained." We do not understand the appellants to maintain that, as a rule of equity, Mrs. Orth should have been punished, or that her children shall now be punished, to the extent of giving up all of the property devised, because of her fraud or their

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fraud. Nor is it more reasonable that, because of fraud, if such it be, without being able to ascertain and define the nature and extent of the trust which the testator may have had in mind, a court of equity should affix the punishment at a sum equal to one-third of the property devised, and confer it upon William's heirs. If we are unable to ascertain the nature and extent of the trust intended, we are powerless to enforce it, and are unauthorized to gauge it to meet the ordinary rules of equality. As already indicated, the letter creates no trust; the parol promises create no trust; and the letter and the promises together, so far from creating a trust, but constitute the promise to perform in the future a duty neither legal nor equitable. Does this breach of duty work such fraud and injustice as to require that equity shall construct a trust in behalf of the heirs of the testator? If it does, equity will be required, contrary to the views of the appellant, and contrary to our view of the effect of the letter, to go to the letter, and from it frame the terms and conditions of the trust, and supplement them with the oral promise creating it, and engraft both upon the will to its overthrow. But we are not willing to concede that the fraud is such as to raise a trust *ex maleficio*. Such a trust, in its very nature, implies the absence of an intention on the part of the parties to create a trust by their own expression; for it would be but to repeal the statute of trusts, R. S. 1894, section 3391, forbidding the creation by parol, of a trust concerning lands, to permit the parties, after declaring a parol trust and violating it, to then plead that violation as the fraud calling for the equitable construction of that particular trust. "Constructive trusts include all those instances in which a trust is raised by the doctrine of equity for the purpose of working out justice in the most efficient manner, where there is no

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intention of the parties to create a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal declaration of the trust." 2 Pomeroy's Eq. Jur., section 1044; Perry Trusts, section 166; *Pillow v. Brown*, 26 Ark. 240; *Hollingshead v. Simms*, 51 Cal. 158; *McLane v. Johnson*, 43 Vt. 48; *Thompson v. Thompson*, 16 Wis. 94; *Collins v. Collins*, 6 Lansing 368; *Griffith v. Godey*, 113 U. S. 89; Lewin Trusts, p. 180, note 1; *Mescall v. Tully*, 91 Ind. 96; *Wright, Gdn., v. Moody*, 116 Ind. 175.

There are, perhaps, cases where parol trusts, ineffectual under the statute, have been procured by such fraud and deceit, as that equity will grant relief for the fraud without regard to the declared trust; but such cases do not proceed upon the idea that equity enforces the trust which is inhibited by the statute; but rather upon the idea that equity constructs a trust. If Mrs. Orth, by fraud, had procured the execution of the will in this case, equity would have held her a trustee for the benefit of those entitled by law to the property. Possibly, if the testator had, after the execution of his will, manifested a desire to create a specific legal trust in behalf of his children, and Mrs. Orth had, by fraud, dissuaded him, equity would have ridden over the fraud and established a trust of the terms of such legal trust. Here we have no showing that Mrs. Orth procured the will to be written in the present form, nor have we allegations of an intention on the part of the testator, subsequent to the execution of the will, to execute another and different will, including specifically or generally a trust of the character of that here claimed. Nor have we allegations of a desire on his part to execute any valid separate instrument declaring such a trust. It is alleged generally that Mrs. Orth "dissuaded the said Godlove

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from making changes in his said will in favor of the said William M. Orth, or making other provisions for him, which he would otherwise have done," but it is nowhere alleged that the testator expressed a desire to, and was by fraud dissuaded from making a trust, such as that here sought to be constructed upon equitable rules. While the complaint is probably subject to the objection of appellees' counsel, that it does not allege the acts constituting any fraud claimed to have been exercised, we need not condemn the pleading on that ground; but, giving the pleading the most favorable construction in behalf of the appellants, the fraud of Mrs. Orth consisted in failing to comply with the requests contained in the letter, having promised her husband that she would comply with them. This, we say, is not such fraud as equity would accept as sufficient to require the construction of the trust here insisted upon. In 27 Am. and Eng. Ency. of Law, page 52, it is said: "There is a sharp conflict among the authorities as to what constitutes such fraud as will justify the admission of parol evidence to establish a trust in favor of the grantor. The earlier English cases were very liberal in admitting such evidence; but the current of modern authority is to the effect that parol evidence is not admissible to show an agreement to hold property in trust where it is conveyed by a deed absolute on its face, unless the instrument was obtained by fraud or was made absolute by mistake. In other words, while the refusal to execute or acknowledge such trust may constitute fraud in a certain sense, it is not such fraud as will render parol evidence admissible to establish the trust. Any other rule would make the Statute of Frauds practically ineffective. But where there is fraud in obtaining the conveyance, or in the means used to secure its execution in the particular form in which it is drawn, or

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where, by accident or mistake, it fails to express the real intention of the parties, parol evidence may be admitted for the purpose of affording relief to the injured party." To these propositions, many authorities are cited.

In *Jackson v. Myers*, 120 Ind. 504, a suit to enforce a parol promise to convey lands, it was said: "Conceding that he was morally bound to execute a conveyance without a demand therefor, his failure so to do would not constitute fraud. To so hold would be to abolish all distinction between fraud and breach of contract." In *Fouty v. Fouty*, 34 Ind. 433, a suit for like purpose, it was said: "Representations upon which fraud can be predicated must be of an existing fact, or of a fact alleged to exist, and not a mere promise to do something afterwards." *Richter v. Irwin*, 28 Ind. 26, presented a like question, and was decided in the same way. So in *Peterson v. Boswell*, 137 Ind. 211.

But it is insisted by appellants that there is a distinction between deeds and wills as to the fraud necessary to construct a trust. It is probably true, upon the English cases, but where a testator has, by his will, made an absolute devise, and, subsequently, has formulated, in writing or by parol, a trust which he desires to engraft upon such devise, or desires to make a new will expressing such trust, and is, by the fraudulent representations and promises of the devisee, prevented, or wrongfully dissuaded from doing so, equity would construct that trust and deny the devisee the fruits of the fraud perpetrated. This may be true as to a will, but could not be true as to a deed, because, in the first, such trust can be engrafted, and in the last, all control has passed from the grantor. We have already shown that we have here no case parallel to that of the testator just supposed, nor have we any

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reasons for concluding that the same conduct following the execution of a will should be more effective as a fraud and in raising a trust *ex maleficio*, than if it had been exerted to procure the execution of a deed, and is followed, as in the case of the will, with the mere omission or refusal to execute the parol promise. That the parol promise of one to convey to another, in the event of a conveyance to him, will not, upon refusal to comply, take the case out of the statute of trusts, has frequently been decided by this court. *Peterson v. Boswell, supra*; *Fouty v. Fouty, supra*; *Montgomery v. Craig*, 128 Ind. 48; *Pearson v. Pearson*, 125 Ind. 341; *Wright v. Moody, supra*; *Mescall v. Tully, supra*; *Rooker v. Rooker, Gdn.*, 75 Ind. 571; *Irwin v. Ivers*, 7 Ind. 308.

In *Sands v. Thompson*, 43 Ind. 18., on page 28, this court quotes with approval the following extract from Browne on the Statute of Frauds: Section 439. "The fraud against which equity will relieve, notwithstanding the statute, is not the mere moral wrong of repudiating a contract actually entered into, but which, by reason of the statute, the party is not bound to perform for want of its being in writing. This was early laid down by Lord Macclesfield, chancellor, in a case arising upon a promise of a defendant, about to marry, that his wife should enjoy all her own estate, to her separate use after the marriage, which promise, as one made 'upon consideration of marriage,' could not regularly be enforced. His Lordship declared that, 'in cases of fraud equity should relieve, even against the words of the statute, as if an agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this, or such like cases of fraud, equity would relieve; but where there was no fraud, only relying upon the honor, word, or promise of the defend-

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ant, the statute making those promises void, equity would not interfere.'” *Irwin, Admr., v. Hubbard*, 49 Ind. 350, see p. 355; *Hayes v. Burkam*, 51 Ind. 130; *Mescall v. Tully, supra*; *Wallace, Admr., v. Long, Gdn.*, 105 Ind. 522; *Green v. Groves*, 109 Ind. 519; *Pearson v. Pearson, supra*; *Stonehill, Exr., v. Swartz*, 129 Ind. 310.

Upon the assumption that the letter, with the parol promise to comply with the wishes therein expressed, constitutes a contract to provide for William M. Orth, by the will of Mrs. Orth, the case of *Wallace v. Long, supra*, is pertinent, not only upon the question of fraud, but also upon the question of the recovery of damages by his heirs for a violation of any such contract. In that case, a child had gone into the family of Fette to live with and as a member of such family, upon the parol promise of Fette that if she would so live with his family during the lives of himself and his wife, “they would treat and deal with and towards her as their child; they would make her their heir, and, at their death, or at the death of the survivor of the two, they would will, bequeath, and give her the entire estate of which they were possessed.” She remained in the family, complying with her part of the contract until Fette and wife had both died; they having made no provision, by will or otherwise, for the child. This court, speaking by Mitchell, J., said: “The evidence in this case tends to support the view that it was the purpose of the intestate to make provision for the plaintiff’s ward by will, may be conceded, but as the agreement to do so was never manifested in writing, signed by her, and as it involved an agreement for the sale of real estate, and for the transfer of personal property exceeding in value \$50.00, such agreement was subject to the operation of the statute of frauds, equally with all other agreements for like sales. Be-

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cause the agreement was not withdrawn from the operation of the statute by part performance, it can not be specifically enforced, neither can it be the foundation of an action for damages."

So, with relation to the obligation supposed to exist from the letter and parol promise to assist William from time to time, and to convey to William's daughter the house and lot in which he lived with his family. However, as to these elements of the alleged promises, there is no charge of violation by Mrs. Orth, and should be considered neither as supplying an element in the alleged fraud, nor of the claim for damages.

Another line of decisions in this State is probably violated by the claim of the appellants, and that is that equity will not enforce a promise in whole or in part of a mere volunteer, an executory parol trust. *Noc v. Roll*, 134 Ind. 115; *Peterson v. Boswell*, *supra*; *Stonehill v. Swartz*, *supra*; *Pearson v. Pearson*, *supra*; *Wright v. Moody*, *supra*; *Gaylord v. City of Lafayette*, 115 Ind. 423; *Tescall v. Tully*, *supra*; *Dunn v. Dunn*, 82 Ind. 42; *Fouty v. Fouty*, *supra*; *Irwin v. Ivers*, *supra*. If many of these cases were correctly decided, the case falls within the rule suggested.

However, we do not rest our decision upon this suggestion, but adhere to the rules which directly affect the principal questions in the case.

The judgment of the circuit court is affirmed.

OPINION ON PETITION FOR REHEARING.

HACKNEY, J.—One contention on behalf of the appellants is that at common law a parol trust in personal property was permitted, and that as our statute of trusts relates to real estate alone they have maintained their claim to a trust in the personal estate of the testator, alleged to have been of the value of

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\$100,000.00. It may be conceded that, at common law, a trust in personal property may be created by parol. *Bispham Eq.*, section 63; *1 Perry Trusts*, section 86; *Lewin Trusts*, section 53; *Hill Trustees*, section 57. Our statute of trusts and powers probably does not deny the common law rule in this respect.

But in this case, the controversy is as to whether the testator, who made a plain and unequivocal devise of his personal estate to his wife, did, in any manner, not forbidden by law, revoke that devise and create a new disposition of said estate. Revocation cannot be made except by intentionally destroying the will, or by the execution of a writing, subscribed and attested in manner as required in the execution of wills. R. S. 1894, section 529. Certainly a partial revocation or an amendment by way of codicil, falls within this statutory rule. The rule with relation to precatory trusts, fortified by the authorities cited in the original opinion, recognizes no distinction between real and personal property. The rule which denies force to language, relied upon to cut down an unequivocal disposition of property, unless it clearly and unmistakably discloses the testator's intention to do so, admits of no distinction between devises and bequests. The rule which forbids evidence in parol to contradict instruments of writing knows no difference between writings as to real and those as to personal property. To our minds it seems clear that no question arises in this case as to the power to create a trust in personal property by parol. The question is as to a method of destroying the force of a valid testamentary disposition of such property.

If no will existed it is doubtful if the letter and the promise of Mrs. Orth, as to the personal property, would avoid the statute of frauds and perjuries. R. S.

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1894, section 6635; *Wallace, Admr., v. Long, Gdn.*, 105 Ind. 522. But of this we need not decide.

It is further contended that the rule that one, occupying a fiduciary relation to another and obtaining an advantage by reason of that relation, is presumed to have obtained that advantage fraudulently, applies in this case. We are not prepared to sanction the doctrine that a devise to the wife by her husband is presumptively fraudulent, and that therefore equity will charge the property with a trust in favor of those who may stand in the relation of heirs. The rule stated by the learned counsel for appellants exists, but it has never been applied, so far as our observation and researches have disclosed, to the case of a testamentary provision by a husband for his wife, in the absence of fraud, undue influence, or some positive advantage taken to induce the husband, against his free will, to make such provision. That a man shall make liberal provision for his wife is not unnatural, but is a duty. That Godlove S. Orth should have given his whole property, in his financially embarrassed condition, to his wife, in the hope that, by prudence and careful management, and the disposition of her separate property, she might save from the wreck something, first of all, for her maintenance, was not unnatural nor suggestive of undue influence or overreaching. See *Montgomery v. Craig*, 128 Ind. 48.

The questions to which we have referred were not argued upon the original hearing, nor was the further contention that the trust sought to be enforced was such as the statute of trusts and powers excepted from its operation as a constructive or implied trust. The latter contention we regard as in conflict with the position originally assumed, as disclosed by our former opinion. We do not, therefore, consider that contention.

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Having again considered the questions originally passed upon, and finding no sufficient reason to reverse the conclusion then reached, the petition for a rehearing is overruled.

CONCURRING OPINION.

HOWARD, J.—I concur in the decision reached by the court in this case. I think the record shows that the testator, in devising his property to his wife, did not thereby create a trust in favor of any of his children; but that he gave his property, without reservation, to her, relying upon her judgment and discretion to do with it as might seem best. He indicated to her what he thought would be best; but the discretion to act in the matter was wholly left to her. It is evident that he was not clear in his own mind as to what should be done; the future might make that plain, and he left the matter in her hands, asking her, as she promised, to do what should be right when the time came for her to act. That she might be able to exercise this discretion, the property was given absolutely to her. There was no trust imposed upon it.

In so far, however, if at all, as the opinion holds, that one who, without consideration paid, receives title to real estate, under promise to reconvey, may afterwards refuse to convey, and justify such refusal under cover of the statute against frauds, I must dissent. There is a well recognized exception to the application of the statute, namely, that one cannot seek to justify his own fraud by a plea of the statute against fraud. A court of equity will not hear him make such a plea. Attempts to retain possession of property received with a promise to reconvey, will also be overthrown, on the ground that the convey-

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ance was without consideration. In any event, a court of equity will seek to do justice within the lines of law, and will not sanction so gross a provision of a statute enacted to prevent injustice. See *Baird v. Baird* (N. Y.), 40 N. E. Rep. 222; *Davis v. Whitehead*, L. R. (1894), 2 Ch. Div. 133. Also, 6 Chicago Law Jour., 562, 720.

DRAKE v. THE STATE.

[No. 17,455. Filed Oct. 29, 1895. Rehearing denied May 28, 1896.]

CRIMINAL LAW.—*Indictment for Murder.—Surplusage.—Statute Construed.*—Where an indictment for murder in the charging part thereof alleged that "Ranph D. did unlawfully," etc., "kill and murder," etc., and an additional averment charged that the murder was committed with a revolver which "he, the said Ralph D., held in his hand," such second charge is mere surplusage and may be rejected under section 1756, R. S. 1881 (section 1825, Burns' R. S. 1894).

CRIMINAL PROCEDURE.—*Murder.—Indictment.—Sufficiency Of.*—An indictment for murder need not charge that the killing was done unlawfully, feloniously, purposely and with premeditated malice but will be sufficient if it charges that the acts which finally resulted in death were done unlawfully, feloniously, purposely and with premeditated malice.

APPEAL.—*Record.—Bill of Exceptions.—Statute Construed.*—The criminal code, section 1847, R. S. 1881 (section 1916, Burns' R. S. 1894), requires that a bill of exceptions "must be signed by the judge and filed by the clerk." And such filing must be after the bill is signed by the judge.

SAME.—*Rehearing.—Record.—Correction of by Certiorari.*—A rehearing will not be granted in order that a party may correct or perfect the record upon *certiorari*.

RECORD.—*Mistake of Trial Court.—Where Corrected.*—Where the record shows that the bill of exceptions was signed by the judge on November 16, and the bill was filed November 15, by the clerk, if the judge in fact signed such bill on the 15th day of November and the bill was filed thereafter on that day, such error is a mistake in the record of the court below and not in the transcript and can only be corrected by the court in which the mistake was made.

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SAME.—*Transcript.*—*Correction of Record of Proceedings in Trial Court.*—The transcript of the proceedings in a cause in this court cannot be corrected by *certiorari* until the mistake or defect in the record of the trial court is properly corrected by said court.

From the Decatur Circuit Court. *Affirmed.*

Hacker & Remy, J. D. Miller, and C. Ewing, for appellant.

W. A. Ketcham, Attorney-General, C. A. Korbly, S. H. Spooner, M. Moores, D. A. Myers, W. M. Waltman, and M. D. Emig, for State.

MONKS, J.—Appellant was tried upon an indictment charging the crime of murder in the first degree, and found guilty of murder in the second degree.

There was a motion to quash the indictment, which was overruled, and this is complained of as error. The part of the indictment upon which the question is presented is as follows: "That Ranph Drake, on the 1st day of June, 1893, at and in the county of Bartholomew, and State aforesaid, did then and there unlawfully, feloniously, purposely, and with premeditated malice, kill and murder one Ida Ward, by then and there feloniously, purposely, and with premeditated malice shooting at and against and thereby mortally wounding the said Ida Ward with a certain deadly weapon, commonly called a revolver, then and there loaded with gunpowder and leaden ball, which said revolver he, the said Ralph Drake, then and there had and held in his hands, of which mortal wound she, the said Ida Ward, then and there instantly died."

It is earnestly insisted by appellant "that it is not certain, from the wording of the indictment, whether it is "Ranph" Drake or "Ralph" Drake who is charged with having committed the offense. It is not required that more be charged in an indictment than is necessary to adequately and accurately express the offense; and when unnecessary averments or aggravations are

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introduced, they can be treated as surplusage and disregarded. It is a well settled rule of criminal pleading, however, that no allegation, though it may not have been necessary, can be rejected as surplusage if it is descriptive of the identity of that which is legally essential to the case. 1 Bishop Crim. Proced., section 485. Thus, an indictment for stealing a horse, it is alleged to be a black horse; the color need not be stated, but if stated, cannot be rejected as surplusage because it is made descriptive of the particular animal alleged to be stolen. In such case the color must be proven, and a variance in the proof of color is fatal. But allegations not essential to constitute the offense, which might be omitted without affecting the charge against the defendant, and without detriment to the indictment, are considered as mere surplusage, and may be entirely disregarded. *Kennedy v. State*, 62 Ind. 136; *State v. White*, 129 Ind. 153; *Mayo v. State*, 7 Tex. App. 342; *Rex v. Morris*, 1 Leach C. C. 127; *Rex v. Redman*, 2 Leach C. C. 536; *Queen v. Crespin*, 11 Q. B. 913, 63 E. C. L. 912; *Tift v. State*, 23 Miss. 567; *Grceson v. State*, 6 Miss., on p. 42; *Commonwealth v. Randall*, 70 Mass. 36; *Commonwealth v. Hunt*, 4 Pick. 252; *U. S. v. Howard*, 3 Sumner, 12; *Farrow v. State*, 48 Ga. 30; 1 Bishop Crim. Proced., sections 481, 485, 487; Wharton Crim. Pract. and Plead., section 158.

If a name is immaterial, that is, if it is unnecessary to the statement of the offense, it may be rejected as surplusage, and will not vitiate the indictment. *Kennedy v. State*, *supra*; *Rex v. Morris*, *supra*; *Mayo v. State*, *supra*; *Commonwealth v. Hunt*, *supra*; *U. S. v. Howard*, *supra*; *Farrow v. State*, *supra*.

In *Commonwealth v. Hunt*, *supra*, the indictment charged that Alva Hunt, etc., in and upon one Peddy Harvey, etc., did make an assault and her, the said Peddy Hunt, did beat, wound, and ill-treat the said

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Peddy Harvey, etc., to ravish," etc. The clause "and her, the said Peddy Hunt then and there did beat, wound, and ill-treat," was rejected as surplusage.

In *Commonwealth v. Randall*, *supra*, the charge was that "the defendant, with force and arms, in and upon Lucy Ann Keach, in the peace of the commonwealth then and there being, an assault did make, and her the said Lucy Ann Keach, with a ferrule which said Randall then and there in his right hand had and held, did strike divers grievous and dangerous blows upon the head, back, shoulders and other parts of the body (of her, the said Lucy Ann Leach, whereby the said Lucy Ann Leach was cruelly beaten and wounded, and other wrongs to the said Lucy Ann Leach then and there did and committed) to her great damage, and against the peace of said commonwealth," etc. It was held that the mistake was clearly a clerical one, that after striking out the part enclosed in brackets, which is the defective portion of the allegation, it charges an assault and battery upon Lucy Ann Leach. Bigelow, J., speaking for the court in that case, said: "Courts of justice are disposed to treat as surplusage all erroneous and improper averments in complaints and indictments, when the residue of the allegation sets out the offense charged in technical language and substantial certainty and precision. The authorities are numerous and decisive on this point."

In *Rex v. Morris*, *supra*, the indictment charged "that Francis Morris the goods and chattels above mentioned, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have; he the said Thomas Morris, then and there, well knowing the said goods and chattels last mentioned to have been feloniously stolen, taken, and carried away." The prisoner was found guilty. It was claimed that the conviction could not be supported for the reason

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that the indictment charged two different persons, one of the name of Francis and the other of the name of Thomas. The point was reserved for the opinion of the twelve judges. Here was an error in using the word Thomas instead of Francis, and the judges held that the words "the said Thomas Morris" might be struck out as surplusage, and the indictment would be sensible and good without them.

The case of *Rex v. Redman, supra*, is to the same effect, except that the words rejected were not the name of the defendant.

In *Mayo v. State, supra*, the indictment, omitting the usual formal portion, was as follows: "That Eli Mayo, on the thirtieth day of July, one thousand, eight hundred and seventy-four, in the county of Houston aforesaid, in and upon one Ella Gann, a female then and there being of the age of eight years, unlawfully, feloniously, and willfully an assault did make; and that the said Eli Mayo, then and there being an adult male, and over the age of fourteen years, did then and there, unlawfully, willfully, and feloniously *and by force, threats, and fraud, then and there by him, the said Eli May, used and practiced upon the said female, Ella Gann, without the consent then and there of said Ella Gann*, ravish and have carnal knowledge of the said female, Ella Gann, by then and there having sexual intercourse with her, the said Ella Gann; against the peace and dignity of the State." There was a motion to quash, which was overruled. The court said: "Looking now to the indictment as copied herein above, we find that, if all that portion which we have italicized be treated as surplusage and stricken out, the indictment as eliminated will be amply sufficient to charge the offense. If they are immaterial and unnecessary, then, as we have seen, they may be treated as surplusage and rejected, and should be. With this

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unnecessary portion rejected as surplusage, the motion to quash was without substantial foundation, and the court therefore did not err in overruling it."

In *Kennedy v. State, supra*, the indictment, after charging John Kennedy with the crime of murder, continued as follows: "And so the jurors, aforesaid, upon their oaths aforesaid, say that the said Frank Kennedy, the said Clarence Hensley, in the manner and by the means aforesaid, unlawfully, feloniously, willfully, and with premeditated malice, did kill and murder, contrary to the form of the statute," etc. This court held that the indictment was complete in its charge of murder without the addition of said clause, that the same was mere surplusage, and that the word Frank was a clerical error. That the case was clearly within the statute providing that indictments should not be quashed for certain defects. See also *State v. White, supra*; *Feigel v. State*, 85 Ind. 580; *Myers v. State*, 101 Ind. 379.

While many of the old forms set out the hand in which the instrument used to inflict an injury was held, it is not necessary to make the allegation, or prove it if made, and the indictment is sufficient without such allegation. *Dennis v. State*, 103 Ind. 142; *Welch v. State*, 104 Ind. 347; *Commonwealth v. Costley*, 118 Mass. 1; 1 Wharton Crim. Law, section 528; 1 Wharton Proced. of Indictments, 114, note L.

Under these authorities, it is clear that the allegation "which said revolver, he, the said Ralph Drake, then and there had and held in his hands," is surplusage, and, if eliminated, the indictment would be sufficient without it. Or, upon the authority of *Rex v. Redman, supra*, the words, "the said Ralph Drake," might be rejected as surplusage and the indictment would be "sensible and good" without these words.

This case clearly comes under the provisions of the

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statutes that "No indictment or information shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected for any of the following defects: * * * *

"Sixth. For any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime and person charged. * * * *

"Tenth. For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Section 1756, R. S. 1881 (section 1825, Burns' R. S. 1894).

We have referred to the name in the charging part of the indictment as "Ranph" Drake for the reason that counsel for appellant have so stated the name, in their brief, although the name may be read as "Rauph" Drake, and was probably so considered by the court below, but whether the name is "Ranph" or "Rauph," the result is the same.

It is urged that a motion to quash should have been sustained for the additional reason that the intent or purpose to kill must be alleged. That it is not sufficient to charge; that the acts which finally and eventually resulted in death were done unlawfully, feloniously, purposely, and with premeditated malice; but it must be alleged that the killing was done unlawfully, feloniously, purposely, and with premeditated malice.

This is what is charged in the indictment, and the same is not open to the objection urged. The indictment charges that the appellant "did then and there, unlawfully, feloniously, purposely, and with premeditated malice, kill and murder Ida Ward," etc.

Indictments, however, which only charged that the acts which finally resulted in death, were done unlawfully, feloniously, purposely, and with premeditated

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malice, have been held good in this court. *Henning v. State*, 106 Ind. 386, and cases cited.

There was no error in overruling the motion to quash.

The other errors assigned are: "2. That the court erred in overruling appellant's motion to discharge the jury and release the appellant. 3. That the court erred in overruling the motion for a new trial."

The second error presents no question, as the same is only a cause for a new trial.

It is insisted by appellee that what purports to be a bill of exceptions, containing the evidence, etc., is not properly in the record, for the reason that there is nothing to show that the same was ever filed in the court below, and that therefore no question is presented by the motion for a new trial.

The point made is sustained by the record. The criminal code requires that a bill of exceptions "must be signed by the judge and filed by the clerk." Section 1847, R. S. 1881 (section 1916, Burns' R. S. 1894). The statute is mandatory as to both the signing by the judge and the filing by the clerk. It is only when the bill of exceptions is "signed by the judge," and afterwards "filed by the clerk," and these facts are shown by the record that the same constitutes a part of the record and can be considered by this court. *Stewart v. State*, 113 Ind. 505; *Shewalter v. Bergman*, 132 Ind. 556, and cases cited; *Guirl v. Gillett*, 124 Ind. 501; *Mason v. Brody*, 135 Ind. 582; *Board, etc., v. Huffman, Admr.*, 134 Ind. 1; *Hormann v. Hartmetz*, 128 Ind. 353; *Ayers v. Armstrong*, 142 Ind. 263; *Wenning v. Teeple*, 144 Ind. 189; *Prather v. Prather*, 139 Ind. 570; *Evansville, etc., R. R. Co. v. Meadows*, 13 Ind. App. 155 and cases cited; *Elliott App. Proced.*, section 805.

Such filing must be after the bill is signed by the judge. *Ayers v. Armstrong*, and authorities cited, *supra*.

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The record in this case shows that the bill of exceptions was signed by the judge on November 16, 1894, and there is nothing to show that it was filed by the clerk after it was signed by the judge. The record states that what purports to be a bill of exceptions was filed in the clerk's office November 15, 1894, but not being at that time signed by the judge, it was not a bill of exceptions, and did not thereby become a part of the record. *Ayers v. Armstrong*, and authorities cited, *supra*.

It follows that what purports to be a bill of exceptions is no part of the record.

No question is therefore presented as to the action of the court in overruling the motion for a new trial.

Judgment affirmed.

OPINION ON PETITION FOR REHEARING.

Per Curiam—Counsel for appellant, in the petition for a rehearing, ask “the court to grant a rehearing in order to enable the appellant to have his transcript corrected in this, to-wit: that the date of the signing of the appellant's bill of exceptions by the trial judge is erroneously stated therein as being the 16th day of November, 1894, when it ought to be the 15th of November, 1894, as shown by the affidavits herewith filed.” It is urged that the rehearing be granted so that an order, commonly called a *certiorari*, may be issued for the amendment of the transcript.

It is a rule, established by an unbroken line of the decisions of this court, that a rehearing will not be granted in order that a party may correct or perfect the record upon *certiorari*. *Warner v. Campbell*, 39 Ind. 409; *Pittsburgh, etc., Co. v. Van Houten*, 48 Ind. 90; *Cole v. Allen*, 51 Ind. 122; *State, ex rel., v. Terre Haute, etc., R. R. Co.*, 64 Ind. 297; *Merrifield v. Weston*, 68 Ind. 70; *Mansur v. Churchman*, 84 Ind.

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573 ; *State v. Dixon*, 97 Ind. 125 ; *Board, etc., v. Center Tp.*, 105 Ind. 422, and cases cited on p. 444 ; *Miller Admx., v. Evansville, etc., R. R. Co.*, 143 Ind. 570 ; *Elliott App. Proced.*, section 208.

Judge Elliott, in his work on *App. Proced.*, at section 208, says: "The rule is well settled that amendments will not be permitted after the decision on appeal. The duty of parties is to see that the record is properly made up, and if they fail to move promptly in securing a correction or amendment, where amendments or corrections are necessary to make a perfect record or fully present the questions, their complaint will not be heeded. It is incumbent upon the party desiring the amendment or corrections to take the necessary steps to secure it before the record is finally acted upon, and he must see that the officers of whom duties are required perform those duties." It is no excuse for a failure to perform this duty that the attorney-general's brief, raising the question that the bill of exceptions was not in the record, was only filed a few days before the decision, and that he did not furnish appellant a copy thereof. It was the duty of appellant and his counsel to examine the transcript and ascertain if the same was correctly prepared, and to take timely steps to correct any errors therein. No excuse for failing to perform this duty is shown. Even if the attorney-general had not discovered the infirmity in the record and pointed it out, this court was not required to disregard the same and determine questions not in the record on account of the defective transcript. *Miller v. Evansville, etc., R. R. Co., supra*.

It will be observed that the petition for a rehearing proceeds upon the theory that the original bill of exceptions, signed by the judge, shows, over his signature, that it was signed by him November 15, 1894,

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and that the clerk in copying said date erroneously wrote it November 16, 1894. What purports to be a bill of exceptions containing the evidence, which we have held was not a part of the record, for the reason that it was never filed in the clerk's office after it was signed by the judge, is the original instrument signed by the judge, and not a copy. The original instrument is signed by the judge, and over his signature is the statement that it was tendered to him on "the 16th day of November, 1894," and was signed by him "this November 16, 1894."

If the judge signed the bill on November, 15, 1894, and the same was filed in the clerk's office on that day, as claimed by appellant, then the date, November 16, 1894, contained in said original bill over the signature of the judge is a mistake in the record of the court below, and not in the transcript. Such mistakes can only be corrected by the court in which they were made. Elliott App. Proced., section 206.

It is only when a mistake or defect in the record of the trial court is corrected by said court on a proper application that the transcript of the proceedings in said cause in this court can be corrected by *certiorari*. It follows, therefore, that even if this cause had not been decided, that no order could issue to the clerk of the court below to correct the transcript concerning the date the bill was signed by the judge until the record was corrected in the court below, on a proper proceeding for that purpose.

The petition is therefore denied.

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[No. 15,908. Filed January 21, 1896. Rehearing denied May 28, 1896.]

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SWAMP LANDS.—Survey.—Sufficiency Of.—Statute Construed.—Under section 2395, U. S. R. S., a sufficient survey of lands is made which runs parallel lines each way, at intervals of two miles, and makes a corner on each line at the end of every mile; and which is completed under section 2396, U. S. R. S., by running straight lines from the established corners to the opposite corresponding corners, and where no such opposite or corresponding corners have been or can be fixed, by running from the established corners due north and south, or east and west, as the case may be, to the watercourse or other external boundary of such fractional township, and such limit of survey extends over both land and water.

SWAMP LAND ACT.—Re-survey.—Affirmance by Land Office.—Where lands were fully surveyed in the original survey, and were conveyed by the United States to the State by the swamp land act of 1850, the title of such lands passed to the State by virtue of said act, notwithstanding a re-survey thereof was afterward made by the land department.

From the Lake Circuit Court. *Affirmed.*

W. P. Fennell, and *Mason & Latta*, for appellant.

Miller, Winter & Elam, for appellees.

HOWARD, J.—This was an action to quiet title to real estate, brought by the appellee, Sophia A. Conklin, against the appellant and other defendants, made appellees on this appeal. Various answers and cross-complaints were filed by the appellant and by other defendants, and the cause was submitted to the court

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for trial, resulting in a finding and decree against the plaintiff.

A new trial having been granted, as of right under the statute, the cause was resubmitted to the court for trial upon the pleadings in the first trial. There was a special finding of facts on this second trial, with conclusions of law, and a decree against the plaintiff, and also against the appellant and others, and in favor of certain of the appellees; and the appellant, as also the plaintiffs and others named, were enjoined from setting up or asserting any claim or title to the land in question.

Many alleged errors are assigned by the appellant, most of which are irregular, and could be considered only as reasons for a new trial. Neither party, however, has given special attention to the assignment of errors; both preferring to discuss the controlling facts and the law in relation thereto.

The land in controversy is situated in Lake county, in the extreme northwest corner of the State. It is described in the complaint as: "Lot number 5, in section 36, township 38 north; lots 8, 9, and 10, in section 1, township 37 north, and lots 5, 6, 7, and 8, in section 12, township 37 north, all in range 10 west, Lake county, Indiana, and containing 252.5 acres, more or less."

The appellant, in her cross-complaint, made claim to the same land, "in plaintiff's complaint described," and asked that her title thereto be quieted as against the plaintiff and all of her co-defendants; and that they be enjoined from setting up any claim thereto.

The appellees, who are in possession of the lands in controversy, claim title under the original government survey, by virtue of patents from the United States to

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the State of Indiana, and from the State to their remote grantors.

Townships 38 and 37 north, range 10 west, in which the lands are situated, were originally surveyed in 1834, under authority of the United States land department, as shown by the field notes and plats made a part of the record. These townships are both fractional, lying next to the State line dividing Indiana from Illinois, and are in part covered by a body of water known as Wolf lake.

The appellees claim that title to all of these lands passed from the general government to the State of Indiana by the Swamp land act of September 28, 1850, subject only to identification and selection by the State and approval thereof by the Secretary of the Interior. The patent from the United States to the State is dated March 24, 1853. In this patent it is recited that "The United States of America, in consideration of the premises and in conformity with the act of Congress aforesaid, have given and granted, and by these presents do give and grant, unto the said State of Indiana, in fee-simple, subject to the disposal of the legislature thereof, the tracts of land above described." The tracts so described include: "The whole of fractional sections 1, 12 * * all in township 37 north, of range 10 west; * * * also the whole of fractional section 36, in township 38 north, of range 10 west." The court found the title thus traced by appellees to be good, and held that they were entitled to continue in possession of the lands in dispute.

The appellant contends that the bed of Wolf lake, covering a part of the above described sections, as aforesaid, was not surveyed in the original survey of 1834; and shows that on representations to that effect,

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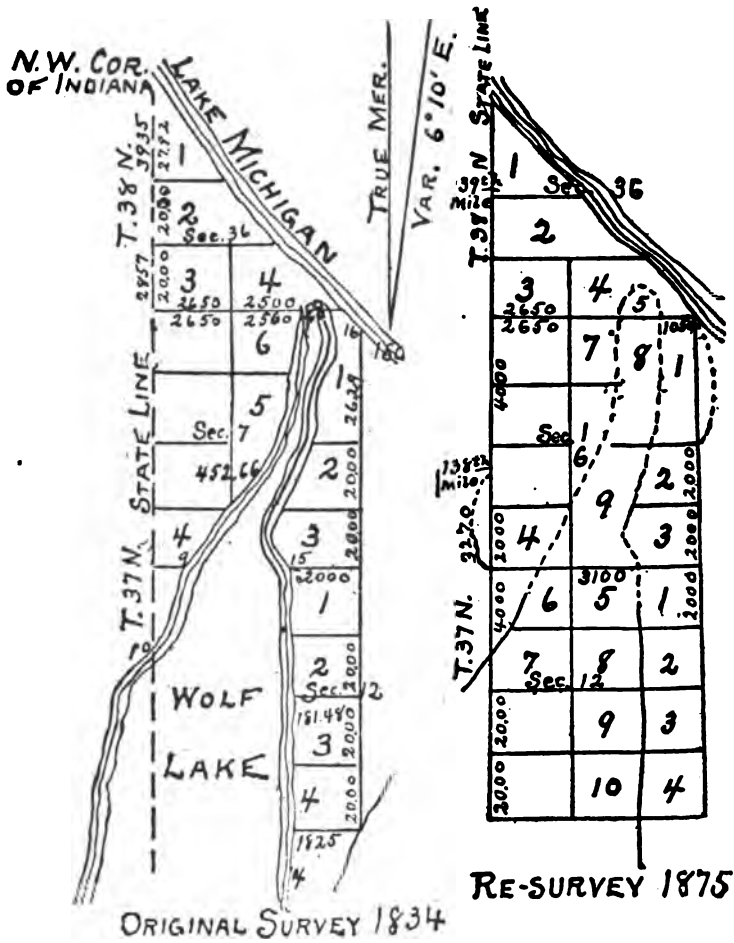
made to the land department of the United States, the commissioner of the general land office ordered a re-survey of the land within the meander lines of the lake, which re-survey was made in 1875. Appellant then claims that on such re-survey, by the land department, the lots in the lake bed became subject to entry and sale, and subject also to the right of appellant's remote grantors to locate "Sioux half-breed scrip" thereon; and she traces her title from patents issued for said lots to such remote grantors on such location of half-breed scrip.

Appellees, on the other hand, contend that all said fractional sections, including the bed of Wolf lake, were surveyed in 1834, and the lands and lots sold by the United States under such survey, so that, rightfully, the government had no such land to survey or sell when the order for the survey of 1875 was made and the lands in question attempted to be resold by the land department.

As the appellant must succeed, if at all, on the strength of her own title, it will be sufficient to decide the contention here made. If the lands in controversy were, in fact, surveyed in 1834, and sold by the United States under such survey, then it is clear enough that the government had no authority or power to re-survey the lands in 1875, or to sell them over again, and appellant's title must wholly fail.

The annexed plats show the original survey, in 1834, of section 36, in township 38, and of sections 1 and 12, in township 37; and also the re-survey, in 1875, of that part of the bed of Wolf lake, in the same townships and sections, being all that is necessary to indicate the location of the lands in dispute.

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We are of opinion that in the original survey of 1834, both townships in question, and all of the sections were fully surveyed, including the bed of Wolf lake.

The plat, with the chains marked thereon, shows that the townships are both fractional. Township 38 consists only of fractional section 36, lying between the Illinois line and Lake Michigan. Township 37 is less than a mile in width, extending from the east township line west to the State line. The field notes show that the east section line, and also the west line, being the State line, were actually run; and that the section corners on said east section line of sections 1 and 12 were marked. The field notes also show that the east and west line between townships 38 and 37, being the north line of section 1, township 37, was actually run, except a short distance in the northeast corner, which extends into Lake Michigan; also that the east and west section line between sections 1 and 12, township 37, was run; also that the east and west section line on the south side of section 12, township 37, was run from the southeast corner of said section west to the lake, this line not being extended in the field across to the State line, or west line of the section. The field notes further show, as does the plat, that all the interior lines of section 36, in township 38, and the greater part of those in sections 1 and 12, in township 37, were actually run and the corners marked in the field.

Under the provisions of sections 2395 and 2396, R. S. U. S., the foregoing was a sufficient survey of the townships and sections named. By section 2395, R. S., *supra*, it is made a sufficient survey to run "each way, parallel lines at the end of every two miles; and by marking a corner on each of such lines, at the end of every mile." In the foregoing survey the east and

west section lines, as actually run, are less than a mile apart. All the lines, interior and exterior, of section 36, township 38, are actually run; so also are all the lines, interior and exterior, of section 1, township 37. For section 12, township 37, the north line is actually run.

There remains only the south line of said section 12, a part only of which is run. For this defect, if it should be considered such, section 2396, U. S. R. S., *supra*, provides as follows: "The boundary-lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary-lines shall be ascertained by running from the established corners due north and south, or east and west lines, as the case may be, to the watercourse, Indiana boundary-line, or other external boundary of such fractional township." Following this direction, the south line of section 12 will be found by "running from the established corner," at the southeast corner of said section, a "due east and west line, west to the State line, being the west external boundary of such fractional township."

It appears, therefore, that township 37, as well as township 38, was fully surveyed in the original survey of 1834; that the lines of the survey extend over both land and water, and that the United States conveyed to the State the fractional townships so surveyed.

It follows that all the territory in question, in the two townships, including that covered by Wolf lake, as well as the comparatively dry land on its borders, having passed to the State from the ownership of the United States by the Swamp land act of 1850, and the patents issued to the State therefor in 1853, no land

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in said sections remained, whether under Wolf lake or elsewhere, which could be re-surveyed or resold by the general government. The survey of 1875, and the sales thereunder, were nullities. Appellant, therefore, has no title to the lands claimed by her. See *Tolleston Club v. State*, 141 Ind. 197, where a similar question is considered, and a like decision reached.

Two objections made to this conclusion may be noticed:

First. It is said that the validity of the re-survey of 1875 having been affirmed by the United States land department, which department had full jurisdiction of the matter, the question is not reviewable in the courts. It is true, as said in *Hardin v. Jordan*, 140 U. S. 371, that the decision of the land department on matters of fact within its jurisdiction, made in the course of administration, cannot be called in question collaterally.

But, as said in the same case by the Supreme Court of the United States: "If the lands patented were not at the time public property, *having been previously disposed of*, * * * the department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void." See also *Mitchell v. Smale*, 140 U. S. 406.

The other objection made is, that in the Beaver lake case, *State v. Portsmouth Sav. Bank*, 106 Ind. 435, this court decided that the sale of the border lots on Beaver lake, under the original government survey, did not carry title to the lands covered by the waters of the lake. The case is not in point, for the very good reason that in the Beaver lake case the lands under the lake were not surveyed; the survey ceased at the borders of the lake. In the case of Wolf lake, however, as we have seen, the lake itself was included in the survey; the section lines passed over and included

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the waters as well as the land. Had Beaver lake been actually surveyed, as Wolf lake was, the matter would be different; as it is, that case is not in point. The case at bar is ruled by the *Tolleston Club case, supra*.
The judgment is affirmed.

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RAILROAD COMPANY ET AL.

145	229
150	98
145	230
1153	137

[No. 17,647. Filed March 10, 1896. Rehearing denied May 28, 1896.]

RAILROADS. — *Consolidations of Companies.* — *Filing Articles of Agreement.* — *Fees for Filing.* — *Secretary of State.* — *Condition Precedent.* — Under acts 1891, page 84, sections 1 and 2, providing that the Secretary of State shall charge certain fees for filing and recording an agreement for the consolidation of railroad companies and providing that he shall neither file nor record the articles mentioned unless the fees for filing same be first paid, the payment of the fee is a condition precedent to the receiving of the same for filing by the Secretary of State.

STATE OFFICER. — *Fees for Filing Articles of Agreement.* — *Waiver of Advance Payment.* — Where the statute provides that the fees for filing a document shall be paid in advance, and where such fee does not, under the law, go to the officer with whom the same is required to be filed as his own remuneration, but goes into the public treasury for the benefit of the State, such officer cannot waive the advance payment of such fees.

SAME. — *Filing Articles of Agreement.* — When articles of agreement were received by the Secretary of State for the purpose of filing them under sections 1 and 2 of the acts of 1891, page 84, and payment of the fee for filing same was refused, and such officer declined to file them on account of the refusal to pay the fee, the parties were in the same condition as though the offer to file had not taken place.

From the Marion Circuit Court. *Affirmed.*

W. A. Ketcham, Attorney-General, *Smith & Korbly*,
and *L. O. Bailey*, for State.

A. C. Harris, for appellees.

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JORDAN, J.—This action was instituted by the State to recover of the appellee the sum of \$25,000.00, which it claimed accrued to the former under the act of 1891 (Acts of 1891, p. 84), as fees for the filing and recording of appellee's articles of consolidation in the office of the Secretary of State. The complaint avers "That on the 9th day of March, 1881, the Chicago & Eastern Illinois Railroad Company was formed by the consolidation, under the laws of the States of Indiana and Illinois, of certain railways in those States, which company continued in existence; that on the 30th day of April, 1886, another consolidated railroad corporation was formed, under the laws of Indiana and Illinois, under the name of the Chicago & Indiana Coal Railway Company, which company continued in existence; that on June 6, 1894, under the laws of Indiana and Illinois, 'the said Chicago & Eastern Illinois Railroad Company,' as consolidated on the said 9th day of March, 1881, and the said Chicago & Indiana Coal Railway Company, undertook and attempted to consolidate, and did enter into articles of agreement and consolidation, and thereby became 'the Chicago & Eastern Illinois Railroad Company,' the defendants herein—that being the name given the new consolidated corporation in said articles; that by the articles of consolidation, the consolidated company was authorized to issue capital stock to the amount of \$25,000,000.00. * * * * *

"That pursuant to the resolution of the board of directors of the said consolidated company, and the agreement of said consolidated companies, said consolidated company did, on the 7th day of June, 1894, deliver for filing to the Honorable William R. Myers, the then Secretary of State of the State of Indiana, the articles of consolidation aforesaid, and did then and there, on the said 7th day of June, 1894, request

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and demand that said Myers, as such Secretary of State, should cause the same to be filed in the office of the Secretary of State, as by the statute made and provided; and the said William R. Myers, Secretary of State, did then and there, to-wit: June 7, 1894, receive from said consolidated corporation said articles of consolidation for the purpose of being filed, and the said Myers, as such Secretary of State, did then and there notify and inform the officer and agent of said consolidated corporation for presenting said articles of consolidation for filing, that the fee therefor, which by law he was required to collect, amounted to \$25,000.00, and did then and there demand of such agent of said consolidated corporation the payment of said fee of \$25,000.00, but he, the said agent of the said consolidated company, then and there failed, neglected and refused so to do, and wrongfully and unlawfully took and removed the said articles of consolidation from the said office of the said Secretary of State; and although payment of said fee has been often since demanded from the defendants, and each of them, they have wholly failed, neglected, and refused to pay the same, or any part thereof, and the same is now due and unpaid." * * * * *

The cause was put at issue by an answer in denial, upon the part of the appellee, and upon a trial by the court, without the intervention of a jury, the result was a finding "that the plaintiff take nothing by its suit." Over a motion by appellant for a new trial, wherein, among other reasons, it was assigned that the finding was contrary both to the evidence and the law, judgment was rendered upon the finding.

The action of the court in overruling this motion, is the only error assigned in this appeal. The learned counsel for the appellant propound two questions,

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which they contend are presented by the record for the consideration of this court, namely:

"1. Was the appellee, The Chicago & Eastern Illinois Railroad Company, bound to pay the corporation tax provided for in the act of 1891, notwithstanding the Secretary of State did not formally file the articles of consolidation tendered for filing, and received by him?

"2. Was the defendant, under the pleadings filed, in a condition to claim that the articles of consolidation were not actually filed, or is it not estopped because of its unsworn answer in general denial from controverting its corporate existence, as alleged in the complaint, and consequently from claiming that it did not file its articles of consolidation in all respects in compliance with the act of 1891?"

The theory of the complaint, which must be determined from its entire scope and purpose, appears to be, that the appellee, as a consolidated railroad company, presented its articles of consolidation to the Secretary of State for the purpose of having the same filed and recorded by said officer in his office. That said consolidated company requested and demanded that its articles should be filed and recorded by said secretary. That the latter received the same from the appellee for the purpose of being filed, and demanded the payment of \$25,000.00 as the fee provided by the act of 1891, which appellee refused to pay, and wrongfully and unlawfully took and removed the articles from the office of said secretary, and upon demand still refuses to pay said sum, which is due and unpaid. It has been repeatedly affirmed by this court, that a definite theory of the plaintiff's cause of action must be outlined by his complaint, and this the evidence must sustain and the law support, and if he succeeds at all in obtaining the relief demanded, it must be upon such

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theory. The contentions of appellee's learned counsel, in part, are that, under the evidence, the State wholly failed to sustain the allegations of its complaint, and that the judgment of the trial court, for this reason, must be affirmed. They insist that "conceding that the mere presentation of appellee's articles of consolidation, at the office of the Secretary of State, was an 'attempt to organize under Indiana laws,' the record contains ample evidence that the appellee immediately repudiated that attempt. The necessity of filing its articles and paying the fee in order to obtain incorporation, was brought directly to the knowledge of the appellee by the Secretary of State, and the terms of the State's offer were at once rejected. They have never since been accepted."

They further contend that the evidence shows that the "appellee did not leave its articles of consolidation with the officer for action or preservation. It simply showed them to him, and upon learning the amount of the fee, immediately removed them from his office. The officer did not endorse the articles as received into his custody, nor give them a place among other papers, nor file them away."

Assuming that the complaint is sufficient, we may therefore limit our investigation to the cardinal question involved: is the judgment of the trial court a correct result, according to law under the evidence in the cause?

The evidence, which we have carefully read, discloses that about June 7th, 1894, one Chas. E. Heckler, a clerk in the law department of the Chicago & Southern Illinois Railroad Company, in the city of Chicago, and representing this corporation, was sent to Indianapolis, Indiana, for the special purpose of having filed in the office of the Secretary of State of Indiana, the articles of consolidation in question, and also in the

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offices of the several county recorders of the counties through which the line of said railroad passed. Heckler gave his evidence by deposition, and in stating his version as to what took place between him and Mr. Ellis, the deputy Secretary of State, in regard to filing the articles in controversy, testified to the following facts:

"I went to the office of the Secretary of State about 10 o'clock on the 11th of June, 1894, and in going in was met by a gentleman who seemed to be connected with the office. I gave him my card and told him I was connected with the law department of the Chicago & Eastern Illinois Railroad Company, that I had with me the articles of consolidation of the Chicago & Indiana Coal Railway Company with the Chicago & Eastern Illinois Company, and that I was there for the purpose of having these articles recorded in that office. The gentleman with whom I had this conversation afterwards gave me his card, which I now have in my possession, which states that he was W. S. Ellis, deputy Secretary of State, and gave his residence as 29 Hall Place. I told him I also had with me copies of the articles of consolidation, and that we wished to have these articles recorded in his office, and in the offices of the county recorders of the several counties as quickly as possible, and to that end it was our desire that he compare the original with one of the copies to satisfy himself that it was a true copy, and then affix his recording certificate to the original copy and allow me to take it away with me at once, and for him to retain the printed copy, to record at his leisure. He said that would be all right, and asked me if I knew what the fees were for recording the articles of incorporation. I told him that I did not know the recording rates in Indiana, that the fees for recording the articles of consolidation in the office of the Secre-

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tary of State in Illinois had been about \$18.00. Mr. Ellis picked up the articles of consolidation and looked at the amount said to be the capital stock of the consolidated companies, and, after making a computation, said that the fees would be \$25,000.00. * * * I told him I was very much surprised, that I had only been furnished \$200.00 with which to have the articles of consolidation recorded in the office of the Secretary of State and in the offices of the ten county recorders of the counties through which the Chicago & Indiana Coal Railway Company passes, and that I did not understand why, if there was such a law, I had not been told about it, and that I was sure the law department of the Chicago & Eastern Illinois Railroad Company knew nothing about such law. Mr. Ellis told me that several consolidations had been tripped up on that law, that they had received some very large fees, and showed me their books, with records of fees as high as \$30,000.00 for one consolidation. We had some further conversation about the law which I do not recall. I told Mr. Ellis that I would have to consult the general counsel of the Chicago & Eastern Illinois Railroad Company before taking any other steps; that the existence of the law might change the plans of the companies in some way, and I was not familiar with the details of the consolidation, and did not know what they might wish to do. Mr. Ellis said to me that he supposed, at any rate, that I was not prepared to pay the \$25,000.00 that day; and I told him I was not. He said, 'Of course there can be nothing further done about the recording.' I said to him that it would be unnecessary to make any comparison between the original and the copies I had at the time, as, of course, he could not file the articles till the fee was paid. He said: 'No, that is right; I cannot file the articles of consolidation until the fee is paid, and it will, there-

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fore, be unnecessary for you to leave them, as they cannot be considered as filed until the fees are paid.' My recollection is that he said, during the conversation, that it was not the custom of the office of the Secretary of State of Indiana to actually record the articles of consolidation, but that the copies were simply filed and indexed. I remember that during our conversation I used the word 'recorded,' and Mr. Ellis used the word 'file,' and it was in that connection that he explained to me it was not their custom to actually record such documents, but simply to file the copy, and index them. That is substantially all that took place. I then took the articles of consolidation and the copy which I had in my hand and left the office. Mr. Ellis expressed no desire to retain either the original or copy, and said to me that it was unnecessary to leave the copy. I had previously stated to him I wanted to take the original away. There was no fuss or wrangle between Mr. Ellis and myself. * * * He said he did not know how we could escape the payment of the fees unless we reduced the capital stock in the consolidated companies. I told him that I did not know whether that was possible or not, and, in fact, I knew very little about the whole transaction, except that I had been instructed to have the articles recorded, as before stated, and had been furnished with \$200.00 with which to have the work done."

Mr. Ellis, the deputy Secretary of State referred to by Heckler, testified as a witness in behalf of the appellant, and his evidence in regard to what took place at the office between him and Mr. Heckler is substantially the same. He further testified, that he knew that Heckler was taking the document in question away with him when he left the office of the Secretary of State, and that he made no objections to his

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doing so. These two witnesses were the only parties to the transaction relative to the receiving or filing of these articles of consolidation, and there is no substantial conflict between them upon this element of the controversy. An examination of this testimony demonstrates the fact that it entirely fails, under the law, to sustain the averments of appellant's complaint, to the effect that these articles were received by the Secretary of State for the purpose of being filed in his office. It is clearly shown, we think, that when appellee's agent was informed by the State's officer as to the amount of the fee required to be first paid in order to authorize the filing in his office of the document in controversy, and further informed that he could not file it until the same was paid, that this terminated the matter, and the paper was taken away by the agent with the full consent of the deputy Secretary of State.

In order to constitute a filing of the articles of consolidation it was essential, not only that they should have been left with the secretary at his office, but they should have been received and retained by that officer as papers on file. This principle is supported by the following authorities. *Engleman v. State*, 2 Ind. 91; *Lamson v. Falls*, 6 Ind. 309; *Miller v. O'Reilly*, 84 Ind. 168; *Powers v. State*, 87 Ind. 144; *Peterson v. Taylor*, 15 Ga. 483; 7 Am. and Eng. Ency. of Law, 960; *Gorham v. Summers*, 25 Minn. 81; *Goldsby v. Beene's Admr.*, 38 Ala. 248.

In *Powers v. State*, *supra*, this court said: "A paper is filed when delivered to a proper officer, and by him received to be kept on file." The first section of the act of 1891, *supra*, whereby the filing fee is authorized, provides that the Secretary of State shall charge and collect, for the benefit of the State, the following fees, etc. The second section provides as follows:

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“And such Secretary of State shall neither file nor record any of the articles of incorporation, certificates, duplicates, or other papers hereinbefore mentioned, unless all the fees for filing same are first duly paid.”

We think that it is evident, from the above clause, that the legislature intended to make the required filing fee, for the articles and papers mentioned in the statute, a condition precedent to the receiving of the same for filing by the Secretary of State. Under the law, therefore, he would not be authorized to receive and file the papers or instruments mentioned, until this condition of payment of the fee in advance had been fully complied with by the person desiring to file the same in his office. The rule may be asserted, that where the statute provides that the filing fee shall be paid in advance of the filing of the document; and where the money therefor, does not, under the law, go to the officer with whom the same is required to be filed, as his own remuneration, but goes into the public treasury for the benefit of the State, as it does in accordance with the requirements of the statute in question, the officer must be considered, at least, in discharge of the duty enjoined upon him to collect the fee in advance for the services rendered by the State through him, as the agent of the latter, and as such he is not authorized to file the papers or articles presented and required to be filed, although they may be left at his office or in his custody for such purpose, until the fee is first paid; and, in consideration of law, they cannot be held or deemed to be filed, until there is a compliance with this requisite condition.

Under such circumstances, the law is the letter of the officer's agency, and he has no warrant to waive the advance payment of the fee. So it must be apparent, we think, that in the case at bar, assuming that the deputy Secretary of State did receive the

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articles in controversy for the purpose of filing them, that when the appellee declined to pay the fee, the officer only obeyed the strict command of the statute when he declined to file them. He, having properly refused to file the document in question, under the circumstances, had no further control over it, and it was rightfully removed by the agent of appellee. The refusal of the latter to pay the legal fee demanded, prevented the filing of the document, and left the appellee in the same condition as though the transaction, or offer to file, had not taken place. Accepting, and viewing the evidence in a most favorable light to the appellant, it is apparent, we think, that the latter is not entitled to the relief demanded in this action, and that the judgment of the trial court accords with both the evidence and the law. Therefore, having reached this conclusion, the question as to whether appellee was required to file its articles of consolidation with the Secretary of State by reason of the act of March 9, 1891 (Acts 1891, 392), as it existed prior to the amendment by the act of March 11, 1895 (Acts 1895, p. 255), does not require our consideration.

The question as to the status of the legal entity of appellee, whether it is a corporation *de jure* or one *de facto*, and other propositions so ably argued by counsel for the State, under the evidence, can exert no controlling influence over the result reached in the court below; and hence their consideration is not essential in this appeal.

Judgment affirmed.

Byram v. The Board of Commissioners of Marion County.

145	240
182	686
145	240
187	67

BYRAM v. THE BOARD OF COMMISSIONERS OF MARION COUNTY.

[No. 17,587. Filed June 9, 1896.]

TAXATION.—*Assessment of Property Within a Municipal Corporation to Build and Repair Gravel Roads.*—*Statute Construed.*—Under section 6868, Burns' R. S. 1894 (section 5104, R. S. 1881), the whole county is a taxing district for the purpose of raising money to build and keep in repair free gravel roads or turnpikes, and property within a municipal corporation in such county is not exempt from taxation for such purposes, although the gravel roads or turnpikes are situated wholly without the limits of such corporation.

FREE GRAVEL ROADS.—*Taxation of City Property for the Repair Of.*—*Statute Construed.*—The act of March 6, 1891, amending section 61, of an act approved March 14, 1887, declaring that no property within the city shall be taxed for the purpose of repairing any road or bridge without the limits of the city, does not affect the power given by the act of March, 1879, to tax all property within a county for the repair of free gravel roads or turnpikes, such amendatory act has reference only to the exemption of city property from the ordinary road tax.

SAME.—*Taxation of City Property for the Repair Of.*—*Validity of Statute.*—Whether or not property within a city is benefited by the repair of free gravel roads and should be taxed in common with other property of the county for that purpose, is a question for the legislature and not for the courts.

From the Marion Circuit Court. *Affirmed.*

Blackledge & Thornton, for appellant.

A. V. Brown, A. G. Smith, and C. A. Korbly, for appellee.

MCCABE, J.—This appeal arises out of a claim filed by the appellant, before the board of commissioners of Marion county, on the 16th day of March, 1895, to recover from said county, or to secure the refunding by said county to him, of \$82.93, for taxes paid by him on his real and personal property, situate within the

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corporate limits of the city of Indianapolis, where appellant resided; said taxes had been levied by the auditor of Marion county, upon a certificate filed with him by the board of turnpike directors of said county, organized under the statute providing for the repair of free turnpike roads in the various counties of the State, approved March 24, 1879, and amendments thereto. These taxes are alleged to be those assessed, for the purpose aforesaid, for the years 1888 to 1893, inclusive. The commissioners refused to allow the claim, and the claimant appealed to the circuit court, where the appellee demurred to the claimant's claim, or complaint, for want of sufficient facts. The circuit court sustained the demurrer, and the plaintiff declining to plead further, the appellee recovered judgment upon demurrer for costs and that the plaintiff, the claimant, take nothing by his suit.

From that judgment this appeal is prosecuted by the appellant.

The learned counsel for the appellant say: "The questions involved in the case are two: First. Can property within a municipal corporation, under our present statutes, be assessed with taxes by a county board of turnpike directors to repair and maintain, and pay for material for free gravel roads or turnpikes, situated wholly without the limits of such corporation, although within the county?

"Second. Is a statute authorizing a levy upon the property situated within such municipal corporation, to repair free turnpikes without its limits, void?"

The appellant's counsel contend that the first question must be answered in the negative, and hence the levy complained of must be held unauthorized, and the taxes be refunded; and if that question is answered in the affirmative, the second question must

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be answered in the negative, because such statute would be unconstitutional.

The exact question here involved was decided by this court, adversely to appellant's contention, in *Read v. Yeager, Aud.*, 104 Ind. 195.

It is contended, however, on behalf of the appellant, that the constitutional question here raised and discussed was neither discussed nor decided in that case; and that if it had been, that case is practically overruled by *Kerlin v. Reynolds*, 142 Ind. 460, and *Taggart, Aud., v. State, ex rel.*, 142 Ind. 668.

Neither the constitutionality nor the construction of such a statute was involved in *Kerlin v. Reynolds, supra*. Nor was the statute there involved at all similar to the one here involved. The one here involved, provides for the repair of the free turnpike roads of the county. The first section of the act (Acts 1879) provides that the commissioners of the county are constituted a board of turnpike directors, and, among other things, it makes it their duty to certify to the county auditor, on or before the first Monday in June in each year, the amount of money necessary to keep such free turnpikes in good repair. R. S. 1894, section 6868 (R. S. 1881, section 5104).

The next section provides, among other things, that "upon the issue of the certificate, as mentioned in the first section of this act, the county auditor shall levy upon all taxable property of said county such sum, not to exceed one (1) mill upon each dollar of such taxable property for every ten (10) miles of free turnpike roads completed in said county, the receipts thereof to constitute a turnpike fund in the county treasury, to be paid out only upon the order of the county auditor issued upon the certificate of the board of turnpike directors, properly attested by the clerk of said board."

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It is contended that the foregoing language, "all taxable property of said county," must be held to mean, all taxable property of said county outside of incorporated cities and towns in the county. And while it is conceded that *Read v. Yeager, supra*, decides the exact question against appellant's contention, it is insisted that that decision is overruled by the later cases already named above.

The question involved in *Kerlin v. Reynolds, supra*, was whether there was any statutory authority in a township trustee, in a township including within its boundaries an incorporated city, to levy taxes on property within the limits of such city and property taxable therein for ordinary township purposes. It was there said: "Our conclusion renders it unnecessary to consider the manner of making the levy since we have no doubt of the absence of any authority to make a levy for such purposes upon such property. The question does not depend upon the constitutional authority of the legislature to subject the property of the minor political subdivision to taxation for the purposes of the major division, for the reason that the legislature has not, so far as we have been able to learn, attempted by any existing legislation to exercise any such authority. * * * * There is no authority given to tax the people of a township, outside of the city, for the support of interests within and relating alone to the city in its distinct corporate capacity, and it may, in like manner, be said that those interests which are peculiar to the citizens and the property outside such city must find support alone from those whose interests they are, namely, those of the township as distinguished from those of the city. In the absence of affirmative legislation commingling such interests, dividing such burdens and providing that a

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common officer shall protect and enforce them, we must hold that they are to be deemed separate and treated distinctly. * * * This conclusion does not, however, exclude the idea that there may be interests general and mutual as between the citizens and the property within the cities and within the civil township. * * * For such purposes, and in view of such general and mutual interests, such citizens and such property would constitute a taxing district. Therefore, 'the nature of the tax will determine the district,' as said by Judge Cooley, in his work on taxation, p. 153. * * * We have no doubt, in the absence of a common interest between the two municipal corporations, the city and the township, this statute should be construed to apply to the property of the township as distinguished from that within the limits of the independent municipality, the city."

The taxing district by the statute, involved in the case now before us, is made to consist of the whole county. If it is not competent to make it consist of the whole county, then there is no way, under existing legislation, by which the free gravel roads of the county can be kept up and in repair. Such roads must be suffered to fall into decay for want of repairs if appellant's contention is upheld. Nor can it be justly said that the whole county is not interested in keeping such roads in repair, simply because there happens to be an incorporated city within the limits of the county. It is not denied that the whole county may be validly made the taxing district for such repairs if there is no incorporated city or town within its limits.

The legitimate result of appellant's contention is that an incorporated city, that is the flourishing city of Indianapolis, is not interested in keeping the gravel roads of the county in repair. If that proposition is

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one that the courts can judicially know, then it is equally true that they can judicially know that keeping such roads in repair is not beneficial to any taxpayer of the county.

We see no reason why the whole county may not be validly made a taxing district for such purposes; just as the whole county may be and is lawfully made the taxing district to raise money with which to build bridges anywhere in the county, as has always been lawfully done. R. S. 1894, sections 3275, 3282 (R. S. 1881, sections 2885, 2892).

Accordingly, it was justly held in *Read v. Yeager, supra*, that: "Taxable property of the appellant within the city of Evansville is certainly taxable property in Vanderburgh county."

Nor did *Taggart v. State, ex rel., supra*, involve the constitutionality or construction of any statute similar to the one here involved. The holding there was that the statutes on the subject should be so construed as to require the surplus dog tax fund belonging to Center township, in Marion county, to be so divided as to give to the school corporation of the city of Indianapolis its proportion thereof, according to its number of children of school age. This was because that city formed a part of the taxing district composed of the whole township, thus entitling the city to share in the fund it had helped to raise by the tax it had paid. That conclusion not only does not lend any sanction to appellant's contention, but if it has any bearing, is against such contention.

But it is suggested that the case now before us is distinguishable from *Read v. Yeager, supra*. The special charter by which the city of Evansville was then governed was passed by the legislature in 1847. It provided, among other things, that "No person residing in said city shall be compelled or required to

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work on any road without said city, nor shall any property lying or being within the city be taxed for the purpose of making, opening, improving, or repairing any road * * * without the limits of said city."

In the case referred to it was said of this provision that, "It is manifest, however, from the provisions we have quoted from * * * such city charter, that the exemption from taxation therein provided is an exemption only from the ordinary road tax, which the township trustee, with the concurrence of the board of commissioners of his county, under section 5066, now in force, is authorized to assess, and which has been authorized by previous legislation for more than thirty years."

It is further suggested that the act approved March 6, 1891, amending section 61, of the act approved March 14, 1867, incorporating cities, R. S. 1894, section 3623 (R. S. 1881, section 3161), was passed since our free gravel road acts were passed, and if inconsistent therewith must be held to modify the section already referred to as authorizing the tax here involved. Said section 61, of said act of 1867, as amended by the act of 1891, provides, among other things, that: "No person residing in said city shall be required or compelled to work on any road without the city; nor shall any property lying or being within the city be taxed for the purpose of working, opening, improving or repairing any road or bridge without the limits of said city."

These provisions are word for word as they were in the section of the act of 1867, before the amendment. Acts 1867, p. 63; R. S. 1881, section 3161. The amendment made other changes in the section, but none as to the provisions quoted. Our first free gravel road law was not passed until ten years after the act of

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1867 was passed. Acts 1877, p. 82; R. S. 1881, sections 5091, 5114.

From these facts, as well as from the language of the provision quoted under the authority of *Read v. Yeager, supra*, the legislature meant by that provision in the act of 1867, only to exempt the property in the city from the ordinary road tax, referred to in that case. Indeed, the provision in question, as it then existed in the act of 1867, was in full force at the time of the decision in that case, and the holding there necessarily construed the provision as we now do, unless it be that such provision has no application to a city governed by a special charter. That, however, would be fatal to appellant's contention, as the city of Indianapolis is governed by a special charter. R. S. 1894, sections 3772-3904.

But we are to inquire what effect the amendatory act had on the provision quoted, in carrying it forward into the amendatory act. The provisions quoted were operative of themselves without regard to the balance of the amendatory section.

It was said by this court, in the case of *Thomas v. Town of Butler*, 139 Ind. 245, at page 252 *et seq.*, that: "It is true, as stated by some of the authorities above mentioned and cited by appellant, that so far as any operative part of the old act has been brought forward and re-enacted by the new act, it is not repealed, and is, as stated by Southerland, continued in operation. * * * It has been frequently held in this and other courts, that the re-enactment of a statute does not operate as a repeal of the former law, but that the effect of the new act is to continue the old act in force. *Gorley v. Sewall*, 77 Ind. 316, and cases there cited; *Reynolds, Aud., v. Bowen, Admr.*, 138 Ind. 434, and numerous authorities there cited. * * * In the revision of laws it is often essential to bring forward into the

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new act many operative portions of the old statute without change or modification, and it is often of the utmost importance to public and private interests that the continuity of the operation of the re-enacted statute shall not be broken by the re-enactment thereof. To hold the operation of the re-enacted statute broken by the re-enactment is to hold, in many cases, that public interests and private rights are swept away beyond the possibility of repair. The principle upon which the continuity of operation of the re-enacted statute rests is the manifest legislative intention. *

* * When they bring forward into the new act such operative portions of the old act, they thereby indicate the legislative will and intent that such provision shall continue to be the law, not that it shall cease to operate, but that its operation as the law shall continue as before."

Therefore, the provision quoted continues in force just as it was before the amendatory section was enacted. It gets its force and effect from its original enactment in the act of 1867. And that effect, we have seen, exempted city property from nothing but the ordinary road tax, such as was referred to in *Read v. Yeager, supra*, and does not have the force and effect to exempt property in cities from taxation for the repair of the free gravel roads of the county. *Read v. Yeager, supra*.

It is, however, contended if the section of the gravel road statute quoted, properly construed, authorized the assessment complained of, and we think it does, that it is unconstitutional, because the property within the city of Indianapolis is not benefited by the repair of the gravel roads of the county. Conceding, without deciding, that such benefit is essential to the constitutionality of such a tax, we are of opinion that that was a question resting within the legislative

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domain to determine. As was said in *People v. Brooklyn*, 4 N. Y. 428 (55 Am. Dec. 266): "In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned; and whose determination of this matter, being within the scope of its lawful power, is conclusive. In the case of *The People v. Brooklyn*, before referred to, it was said that a tax to be valid must be apportioned 'upon principles of just equality,' and upon all the property in the same political district; and that this is a fundamental principle of free government, which, although not contained in the constitution, limits and controls the power of the legislature. This is new and it seems to me to be dangerous doctrine. It clothes the judicial tribunals with the power of trying the validity of a tax by a test neither prescribed nor defined by the constitution. If by this test we may condemn an assessment apportioned according to the relation of burthen and benefit we may with far better reason condemn a capitation tax on the ground that numerical equality is not just equality; or a general property tax, for a local object, because it compels one portion of the community to pay more than their just share for the benefit of another portion. All discriminations in the taxation of property, and all exemptions from taxation on the grounds of public policy, would fall by the application of this test. If this doctrine prevails it places the power of the courts above that of the legislature in a matter affecting not only the vital interests, but the very existence of the government. It assumes that the apportionment of taxation is to be regulated by judicial, and not by legislative discretion. It obstructs the exercise of powers

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which belong to, and are inherent in the legislative department, and restrains the action of that branch of the government in cases in which the constitution has left it free to act."

To the same effect are *Gilson v. Board, etc.*, 128 Ind. 65, and authorities there cited.

The constitutionality of similar legislation seems to be settled in this State. *Turpin v. Eagle Creek, etc., Grav. R. Co.*, 48 Ind. 45; *Law v. Madison, etc., Turnp. Co.*, 30 Ind. 77; *Ricketts v. Spraker*, 77 Ind. 371.

In *Goodrich v. Winchester & Deerfield Turnp. Co.*, 26 Ind. 119, the constitutionality of a similar statute was involved, and this court there said: "In the case in judgment the legislature has determined, and this matter is within its power, that this is a proper subject for taxation, and that the burden imposed is the just share of each person embraced in the provisions of the act. This the legislature has the right to do, unless restrained by some provision of the constitution. * * * We hold the law valid on the ground that it imposes a tax for public purposes, within the constitutional power of the legislature."

It was said in *State, ex rel., v. McClelland*, 138 Ind. 395, on p. 399, that: "With the justice, the propriety, the policy, the advisability or desirability or undesirability of a statute, the courts can have nothing whatever to do, so long as the act does not infringe some provision of the constitution, State or Federal, or some valid treaty or law of Congress. Such objections must be made to the Legislature. *Hedderich v. State*, 101 Ind. 564; *Cooley's Const. Lim.*, 201-204."

Appellant's learned counsel have not pointed out any provision of the constitution which it is supposed the statute in question contravenes, either express or implied, and we know of none.

It has often been held by this court that until such

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contravention by an act of the legislature is shown, it cannot be overthrown by the courts for unconstitutionality. *Robinson, Treas., v. Schenck*, 102 Ind. 307 (319); *State, ex rel., v. McClelland, supra*; *State, ex rel., v. Roby*, 142 Ind. 168.

The question of the constitutionality of the statute under consideration was necessarily involved, though not discussed, in *Read v. Yeager, supra*, and was necessarily decided against the appellant's contention. We adhere to that ruling. It follows that the circuit court did not err in sustaining the demurrer to the complaint.

The judgment is affirmed.

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[No. 17,658. Filed June 9, 1896.]

145	251
156	294
156	638

APPEALS.—Bill of Exceptions.—Documentary Evidence How Made Part Of.—Where a written instrument does not constitute a part of the record without a bill of exceptions or order of court, such instrument should be inserted at its proper place in the bill of exceptions or it will not be a part of the record.

SAME.—Bill of Exceptions.—Receipts.—Bills of exception are not mere abstracts of evidence, but are required to present the full evidence, and the clerk has no authority to substitute abstracts of receipts introduced in evidence, but must copy such receipts in full as introduced.

From the Floyd Circuit Court. *Affirmed.*

Kelso & Kelso, for appellants.

A. Dowling, for appellees.

HACKNEY, J.—This was a suit in ejectment and for damages, and was instituted by Thomas Seston against the appellees, Thomas Tether and Sarah Tether. While the suit was pending, Thomas Seston died testate, and Lizzie Seston, his widow, and Lizzie Ses-

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ton, executrix of his last will, were substituted as plaintiffs. The issue was made by a general denial to the complaint, and a trial resulted in a special finding, conclusions of law, and judgment in favor of the appellees. Upon motion and undertaking by said executrix a new trial as of right was granted to her, and a second trial was had, resulting in a verdict and judgment in favor of the appellees and against each of the appellants, without question as to whether Lizzie Seston had obtained a new trial. Separate motions, by the appellants, for a new trial for cause, were thereupon filed and overruled, and such rulings alone are assigned as error in this court.

The questions here discussed arise upon the evidence and certain instructions, the correctness of which depend upon the evidence.

The objection is made by the appellees that we can not entertain these questions for the reason that the evidence is not all in the record by the bill of exceptions.

In the bill of exceptions are several statements of the introduction in evidence of documents, namely: a deed executed by a commissioner, the record of the probate of the will of Thomas Seston, certain tax receipts offered and read by the appellees, and certain tax receipts offered and read by the appellants. In each instance the document is not copied into the bill at the point where it appears to have been read, but at such points are statements that such documents will be found at pages of the transcript given by numbers and followed with "(here insert.)" Following the bill of exceptions, and on the pages of the transcript so indicated by numbers, are copied by the clerk a commissioner's deed to Thomas Seston, the will of Thomas Seston, and the probate thereof, and two statements, one consisting of fourteen items and one

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consisting of ten items, each item of which is of the character following: "State and county tax. Second installment, 1884, \$9.00." On the margin of the transcript, opposite one of the statements, is the following: "Amount of taxes paid by def'ts, as shown by tax receipts referred to on page 143 of transcript," and on the margin opposite the other statement is the following: "Tax rec'ts, referred to on page 144 of transcript." The two statements mentioned are probably the results or abstracts of the numerous tax receipts introduced in evidence by the parties.

Appellant's learned counsel seek to defend this condition of the record by the citation of R. S. 1894, section 638, and *Cincinnati, etc., R. R. Co. v. Butler*, 108 Ind. 31. The statute cited provides that, "It shall not be necessary to copy a written instrument or any documentary evidence into a bill of exceptions, but it shall be sufficient to refer to such evidence, if its appropriate place be designated by the words 'here insert.'" Of this provision it was said in *Crumley v. Hickman*, 92 Ind. 388: "The former code contained the same provision. Section 343, 2 R. S. 1876, p. 176. In construing this statute it has been held that where a written instrument properly and legally constitutes a part of the record without being made such by a bill of exceptions or an order of court, and where it has already been copied into the transcript, the clerk is not required to again copy such instrument into the bill of exceptions, but may make the same a part thereof by inserting in the designated place a reference to the page and line of the transcript where the same can be found. But if such instrument does not properly constitute a part of the record, without a bill of exceptions, or an order of court, it has also been held that it is the duty of the clerk in such case, in making a transcript, to insert such instrument at its

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proper place in the bill of exceptions; otherwise it is no part of the record."

To the same effect are *Douglass v. State*, 72 Ind. 385; *Colee v. State*, 75 Ind. 511; *Klingensmith v. Faulkner*, 84 Ind. 331; *Board, etc., v. Karp*, 90 Ind. 236; *Cottrell v. Aetna Life Ins. Co.*, 97 Ind. 311; *Lewis v. Godman*, 129 Ind. 359; *Seymour, etc., Co. v. Brodhecker, Treas.*, 130 Ind. 389; *Gussman v. Gussman*, 140 Ind. 433.

In *Klingensmith v. Faulkner*, *supra*, it was said: "And the rule of practice is equally well settled that a document referred to in a bill of exceptions with a (here insert) must be copied at the place indicated, unless it is already a proper part of the record as copied at another place; when, instead of making a second copy, the clerk may refer to the copy already given." See also Elliott App. Proced., sections 818 and 819.

The decision in *Cincinnati, etc., Co. v. Butler*, *supra*, did not modify the rules declared in the foregoing cases. It rather supports them in the declaration that when the document is properly identified it should be inserted at the point indicated by the "(here insert)."

As to the abstracts of the receipts, substituted for copies of the receipts introduced in evidence, there can certainly be no authority having the slightest tendency to support the practice adopted. Bills of exception are not mere abstracts of evidence, but are required to present the full evidence, and the clerk has no authority to state his version of evidence introduced, but must copy it as it was introduced.

No question is properly presented by the record, and the judgment of the circuit court is affirmed.

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DAUGHERTY v. HERZOG.

[No. 17,536. Filed June 10, 1896.]

NEGLIGENCE.—*Liability of Contractor to Third Party For.*—A contractor is not liable to a third party, to whom he owed no duty, who was killed by a falling building which was remodeled and reconstructed by such contractor, in a careless and negligent manner, about two years prior to the time of the disaster, and which fell, by reason of such negligent and imperfect reconstruction.

From the Tippecanoe Superior Court. *Affirmed.*

W. R. Wood, G. P. Haywood and C. E. Lake, for appellant.

R. P. Davidson, for appellee.

MONKS, C. J.—While passing along a sidewalk, on Main street, in the city of Lafayette, appellant's daughter was killed by the falling of the front wall of a building, which stood upon the street line adjacent to the sidewalk. This action was brought, by appellant against appellee, to recover damages for loss of services occasioned by her death. Appellee's demurrer was sustained to each paragraph of complaint, and appellant refusing to plead further, judgment was rendered for appellee.

The facts alleged essential to the decision of the question presented are as follows:

One O'Ferrall for many years had been the owner of the three-story brick building, on the north line of Main street, which caused the accident, consisting of two ground-floor business rooms, one of which was occupied by one Lohman as a drug store. The other room becoming vacant, Lohman desired it also, and wished the two rooms thrown into one, by the removal of the partition brick wall. To this O'Ferrall con-

145 255
158 68
145 255
162 503

145 255
d168 408

145 2
170

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sented and thereupon O'Farrell, or Lohman, or both, employed the defendant, Herzog, this appellee, who was a builder and contractor, by an independent contract, to remove the wall and remodel the building to Lohman's wishes. This work he completed and turned the building over to Lohman, who reoccupied it as a drug store from 1890 until 1892, when the disaster occurred which took the life of the appellant's daughter. It is alleged that the appellee did his work unskillfully and defectively, put in iron posts not sufficiently secured upon the under wall, and did not sufficiently fasten and tie together the iron or steel beams resting on the tops of these posts, and in some other respects negligently did his work; and that because of this negligent and imperfect reconstruction of the building, it fell.

The only error assigned calls in question the action of the trial court in sustaining the demurrer to the complaint.

The rule is that an action for negligence will not lie unless the defendant was under some duty to the injured party at the time and place where the injury occurred which he has omitted to perform. *Evansville, etc., R. W. Co. v. Griffin*, 100 Ind. 221, 222, 50 Am. Rep. 783; *City of Indianapolis v. Emmelman*, 108 Ind. 530, 532, 58 Am. Rep. 55; *Faris v. Hoberg*, 134 Ind. 269, 274, 39 Am. St. Rep. 261; *Louisville, etc., R. R. Co. v. Treadway*, 142 Ind. 475, on page 485. See extended note in *Presbyterian Church v. Smith*, 26 L. R. A. 504.

If appellee failed to repair the building in conformity with his contract he was liable to respond in damages therefor to the other contracting party. But is he also liable to appellant for the injury to his daughter, sustained on account of the defective construction alleged, when neither appellant nor his daughter were parties to the contract?

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Appellee was not liable under the contract, for the reason that such liability could only exist between the contracting parties. If liable at all, it can only be for the violation of some duty. *Faris v. Hoberg, supra; Indianapolis, etc., R. W. Co. v. Griffin, supra; Shearman & Redf. Neg.*, (4th ed.), Vol. 1, section 8.

The only person to whom appellee owed any particular duty was the one with whom he contracted. *State, ex rel., v. Harris*, 89 Ind. 363, 365, 366.

Appellee was not in possession of the building, the repairs had been completed and accepted long before appellant's daughter was injured. The rule in this class of cases is thus stated in *Wharton Neg.* (2 ed.), section 438: "There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition, between the negligence and the hurt of any independent human agency. * * * Thus, a contractor is employed by a city to build a bridge in a workmanlike manner; and after he has finished his work, and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now the contractor may be liable to the city for his negligence, but he is not liable in an action on the case for damages. The reason sometimes given to sustain such conclusion is, that otherwise there would be no end to suits. But a better ground is that there is, no causal connection, as we have seen, between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence in the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an in-

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dependent responsible agent, breaking the causal connection."

In *Winterbottom v. Wright*, 10 M. & W. 109, the plaintiff proved that a mail coach had been defectively constructed; that it was constructed under a contract with the postmaster-general, and that because of its defective construction plaintiff sustained an injury; and the court denied recovery upon the ground that the coachmaker owed plaintiff no duty. Lord Abinger, in the course of his opinion, said: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." To the same effect was the statement of Justice Clifford, in *Savings Bank v. Ward*, 100 U. S. 195, that: "There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect."

In *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638, it was held that the manufacturer and builder of a steam boiler is only liable to the purchaser for defective materials or for any want of care or skill in its construction; and if, after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction to the injury of a third person, the latter has no cause of action, on account of such injury, against the manufacturer.

In *Dale v. Grant*, 5 Vroom (N. J. L.), 142, it was held that an action would not lie in favor of a customer against a wrongdoer who stopped the machinery of a manufactory and prevented the proprietor from performing a contract, and thereby caused loss to the plaintiff to whom the manufacturer had agreed to furnish goods. The court said: "But the law does

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not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs and who have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*." The cases of *Winterbottom v. Wright*, *supra*; *Dale v. Grant*, *supra*; and *Losse v. Clute*, *supra*; were cited with approval by this court in *Hoosier Stone Co. v. Louisville, etc., R. W. Co.*, 131 Ind. 575; and *State v. Harris*, 89 Ind. 363.

It was held in *Curtin v. Somerset*, 140 Pa. St. 70, 23 Am. St. Rep. 220, 10 L. R. A. 322, that a contractor for the erection of a hotel building, who uses improper material in its construction, and in other respects departs from the specifications embodied in his contract, so that when the building is completed it is structurally weak and unsafe, by which an accident occurs after it is accepted and possession taken, is liable to the owner therefor, but not to a guest of the hotel, for an injury caused to him by such defective construction. The court said: "In *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, the court held a dealer in drugs and medicine, who carelessly labels a deadly poison as a harmless medicine, and sells it so labeled into market, to be liable to all persons who, without fault on their parts, are injured by using it. We think this case was correctly decided, but it has no application. The druggist owed a duty to every person to whom he sold a deadly poison, to have it properly labeled to avoid accidents. Just here the analogy between this case and the one in hand ceases. The defendant owed no duty to the

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public, as before stated; his duty was to his employer. * * * *

"If the contractor who erects a house, who builds a bridge, or performs any other work; a manufacturer who constructs a boiler, a piece of machinery, or a steamship, owes a duty to the whole world, that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned."

In *Necker v. Harvey*, 49 Mich. 517, the defendant manufactured and put up in the factory of a soap company an elevator, under a contract that it would lift at least two thousand pounds. The elevator fell by reason of a defective shaft, in three days after it had been put in place, and injured a workman in the employ of the soap company. The court, by Cooley, J., said: "The statement of facts so far makes out no cause of action in favor of this plaintiff. It discloses a duty on the part of the defendant to construct an elevator which would lift two thousand pounds; but the duty was to the soap company, and not to anybody else. Nothing is better settled than that an action will not lie in favor of any third party upon a breach of this duty."

There is a class of cases, however, where the law imposes a duty to third persons, independent of the contract, as in sales of dangerous goods, poisonous drugs or explosive oils. *Thomas v. Winchester, supra*; *Walton v. Booth*, 34 La. An. 913; *Callahan v. Warne*, 40 Mo. 131; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Wellington v. Downer, etc., Oil Co.*, 104 Mass. 64; 2 Jaggard Torts, section 261.

In this class of cases, the vendor owes a duty to the

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public, for the reason that the articles sold were necessarily and inherently dangerous to human life, and did not in any manner disclose their dangerous character. The cases cited by appellant fall within this class, and are, therefore, not in point.

It is clear, we think, from the authorities, that a contractor, in a case like the one in hand, is not liable for mere negligence to a third party, to whom he owed no duty. The conclusion we have reached is also fully sustained by *Heizer v. Kingsland, etc., Mfg. Co.*, 110 Mo. 605, 33 Am. St. Rep. 482, 15 L. R. A. 821, and cases cited in note 424, p. 908 of 2 Jaggard Torts.

Judgment affirmed.

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[No. 17,674. Filed June 10, 1896.]

APPEAL AND ERROR.—*Harmless Error.*—*Record.*—A reversal cannot be had for an error in overruling a demurrer to a paragraph of complaint when it is shown by the record that the finding is not based upon such paragraph.

SAME.—*Longhand Manuscript of Evidence.*—*Bill of Exceptions.*—The original longhand manuscript, to be incorporated in the bill of exceptions, must be filed with the clerk of the court before so incorporated.

SAME.—*Examination of Party Under the Statute.*—*Witness.*—Where the examination of a party defendant had been taken by the plaintiff under the statute, and it was agreed in open court, at the close of plaintiff's evidence, that if the plaintiff would consent to defendants reading said examination as a deposition, the defendants would not examine such witness, and such examination was read, it was not error to refuse to allow the examination of such witness.

NEW TRIAL.—*Excessive Damages.*—*Tort.*—Excessive damages is a cause for a new trial in cases of tort only.

APPEAL AND ERROR.—*Failure of Counsel to Argue.*—*Error Waived.*—Where counsel for appellant fail to argue an error assigned it will be considered waived.

From the Porter Circuit Court. *Affirmed.*

145	261
146	201
147	232
145	261
149	168
145	261
153	593

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H. R. Robbins, for appellants.

W. Johnston, for appellee.

MCCABE, J.—We infer, from certain parts of the transcript, that the appellee sued the appellants to rescind a contract, under the terms of which the plaintiff conveyed certain described land to the appellants, and to recover back certain money.

A separate demurrer to the several paragraphs of the complaint, by each of the defendants, was overruled as to some of the paragraphs. The issues joined upon the complaint and answers were tried by the court, resulting in a general finding for the plaintiff, upon which judgment and decree followed, ordering a reconveyance and other relief over the defendant's motions for a new trial. Error is assigned upon the rulings upon the demurrer and in overruling the motion for a new trial.

The only paragraph of the complaint to which appellants contend the court ought to have sustained the demurrer, is one which the court ordered to be numbered 4, though it had been numbered 3, there being already three paragraphs in the complaint before that one was attached thereto.

The transcript shows that the finding of the court was on the original third paragraph, and not on the one subsequently numbered 4. That one is the only paragraph of the complaint to be found in the transcript. The truth is, there is nothing in the transcript to show that there ever was a complaint filed at all in the case, except by inferences from demurrers and answers filed. The transcript does not purport to contain all of the record, nor even the essential parts thereof. It is enough to say that no question is presented as to the sufficiency of the only paragraph of the complaint found in the transcript, because it is shown that the

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finding is not based on it. Therefore, the ruling upon the demurrer thereto could not affect the substantial rights of the appellants, even though erroneous in the abstract. And unless their substantial rights are injuriously affected, they cannot have a reversal for such an error. R. S. 1894, sections 401, 670 (R. S. 1881, sections 398, 659), and authorities there cited.

One of the grounds specified in the motion for a new trial is that the decision of the court is not sustained by sufficient evidence.

There is in the transcript what purports to be a bill of exceptions, incorporating therein the longhand manuscript of the evidence. But it is not clear that the bill is shown, legitimately, to be a part of the record.

On the 29th of June, 1894, ninety days were allowed the defendants in which to present their bill of exceptions.

The learned judge certifies that the bill was presented to him on September 24, 1894, "but not signed for want of time to examine the same," and yet he signed this statement written at the end of the bill. And below that yet, he states that it is "signed and made a part of the record * * * this 21st day of June, 1893," after which his signature is subscribed.

It is impossible for him to have signed it at that date. There must have been some mistake about it. But treating the last date given by the judge as a mistake, and regarding the date of signing as wholly immaterial, as we think we may, under the statute (R. S. 1894, section 641; R. S. 1881, section 629), where the date of presentation is given, as is the case here, we find another difficulty.

The clerk certifies that the longhand manuscript was filed in his office on the 25th day of September, 1894. That is one day after the bill of exceptions was

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presented to the judge, incorporating thereinto the longhand manuscript. If not filed before it is incorporated into the bill of exceptions, the original cannot be certified here instead of a transcript, as was attempted to be done in this case. *Holt v. Rockhill*, 143 Ind. 530. But treating the longhand manuscript as properly in the record, still it shows that the evidence is not all in the record. There are several places where it is stated that certain deeds were read in evidence and a blank place left in the bill of exceptions to insert them, but they have not been inserted. Again, there is another place where it appears that a copy of one of the missing deeds has been pasted into the transcript since the bill of exceptions was signed.

The evidence is not conclusive that this has been done, but the appellee has produced the affidavit of the stenographer that such copy has been pasted in since the bill of exceptions was signed by the judge. To this appellants' counsel pay no attention. They brought the transcript here and seek a reversal on it; under such circumstances, they are at least called on for an explanation. But we need not, and do not, pass on the question as to whether such copy of a deed has been pasted into the transcript without authority or not, as there are several omissions of copies of deeds that the bill of exceptions shows were read in evidence, and they have in no manner been supplied. Therefore, notwithstanding the statement at the close of the bill that it contains all the evidence given in the cause, it affirmatively shows that it does not. Therefore, we cannot consider the sufficiency of the evidence to support the finding.

One of the grounds specified in the motion for a new trial, is the refusal of the court to allow appellees to introduce one John W. Nichols as a witness in their behalf.

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The reason of the ruling was that Nichols' examination as a party defendant in the suit had been taken by the plaintiff under the statute, and it was agreed, at the close of the plaintiff's evidence, that if the plaintiff would consent to the defendants reading said examination as a deposition, the defendants would not examine such witness; all of which was agreed to in open court, the court at the time admonishing defendants that if they read said examination they would not be permitted thereafter to introduce the witness. They did read the examination, and thereafter the court refused to allow them to examine the witness. There was no error in such refusal.

Another reason assigned in the motion for a new trial, and urged in argument, is "that the damages as found by the court are excessive." Excessive damages is a cause for a new trial in cases of tort only. *Lake Erie, etc., R. W. Co. v. Acres*, 108 Ind. 548; *Thomas, Admr., v. Merry*, 113 Ind. 83; *Moore v. State, ex rel.*, 114 Ind. 414; *Hogshead, Admr., v. State, ex rel.*, 120 Ind. 327; *Western Assurance Co. v. Studebaker*, 124 Ind. 176.

As the appellants have seen fit not to bring the paragraph of the complaint upon which the damages were assessed before this court, we are unable to say that the damages assessed were for a tort. In case they were not, the assignment of excessive damages as a cause for a new trial would not present the question sought to be raised thereby.

The next and third cause for a new trial was concerning the introduction in evidence of a certain deed; but the error, if any there was, in the ruling, was waived by appellants' counsel making no attempt at argument in support of the assignment of the alleged error.

The fourth and only other reason for a new trial dis-

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cussed by appellants' counsel, namely, the insufficiency of the evidence, has already been disposed of. The circuit court did not err in overruling appellants' motion for a new trial.

Finding no available error assigned, the judgment is affirmed.

THE BANNER CIGAR CO. ET AL. v. KAMM & SCHILLINGER
BREWING CO. ET AL.

145	236
155	180
156	237
145	236
156	241

[No. 17,754. Filed June 10, 1896.]

APPEAL AND ERROR.—*Exceptions to Ruling of Trial Court.*—Where no exception was taken to the action of the trial court, no question in relation thereto can be presented on appeal.

SAME.—*Special Finding.*—*Motion to Modify.*—*New Trial.*—*Practice.*—Where a special finding omits material facts, the remedy is by motion for new trial and not by motion to modify.

SAME.—*Time Allowed for Filing Bill of Exceptions.*—*New Trial.*—Where at the time of entry of judgment the court allows 90 days in which to file bill of exceptions, and within the term a motion for a new trial is made, the exceptions upon which such motion is predicated, is carried forward to the time of the ruling on such motion.

CHATTEL MORTGAGE.—*Sale of Mortgaged Property.*—Where a chattel mortgage is executed covering a stock of goods, furniture and fixtures, without the privilege of selling, an action cannot be maintained to declare the mortgage satisfied, on the ground that the mortgagor had remained in possession and sold goods, the net proceeds of which exceeded the amount of the mortgage, where it is not shown that the goods were the goods mortgaged.

APPEAL.—*Evidence.*—The question of weighing evidence and passing upon the conflict thereof is for the trial court.

From the Elkhart Circuit Court. *Affirmed.*

H. C. Dodge, for appellants.

J. S. Dodge and *O. Z. Hubbell*, for appellees.

HACKNEY, J.—The appellants were execution creditors of the appellee, William J. Stamp, and as such instituted this suit to declare paid and satisfied a cer-

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tain chattel mortgage, executed by said appellee to his co-appellee, the brewing company, and which, upon its face, appeared to take precedence of appellants' executions.

At the trial the appellants demanded a special finding, and thereafter, on March 9, 1894, the judge filed in open court what purported to be a statement of facts in said cause, but without conclusions of law drawn therefrom or otherwise stated. At the same term of the court, and without objection or exception, the court entered an order, setting aside said statement of facts, or alleged special finding. Thereafter, and on the 2d day of the succeeding May term of court, a special finding of facts with conclusions of law was filed and entered by the court in said cause, without objection or exception from any of the parties to the filing and entering thereof. Upon said special finding, and on the day of the filing thereof, judgment was duly entered in favor of the appellees, said day being May 2, 1894, and the court granted ninety days from that day in which to file bills of exception.

On the 22d day of May, 1894, the appellants filed two certain motions, to require the amendment of said special finding, in the statement of additional facts, which motions were, by the court, overruled, exceptions were taken and the motions brought into the record by a bill of exceptions, on that day filed. The same bill of exceptions recited the action of the court in setting aside said statement of facts, but disclosed no exception to the court's action.

On the 26th day of June, 1894, the 32d day of the May term, the appellants filed their motion for a new trial of said cause, but no ruling was had thereon until October 1, 1894, the first day of the October term of said court, when said motion was overruled, an exception taken, and a general bill of exceptions filed.

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The record discloses that this bill of exceptions was presented to the judge, for allowance and signature, on the 11th day of September, 1894.

The first question discussed, we state in the language of counsel for the appellant: "I will first present the second ground for a new trial, namely, that the decision of the court was contrary to law, and I shall apply what I say upon that question to the second assignment of error, challenging the right of the court to set aside his special finding of facts, signed and spread upon the records, and to find an entirely new set without another trial. I was not entirely sure of the practice, whether that action should be ground for motion for a new trial, or an original assignment of error, and for that reason I present it both ways."

It will be observed that, from this argument, the second cause assigned for a new trial and the second assignment of error, in this court, involve the same question, namely: the right of the trial court to set aside the finding of facts and thereafter to file a special finding. Objection is made to a consideration of this question, because of the failure of the appellants to object or except to the action of the trial court. This objection, in our opinion, is well taken. "The party objecting to the decision must except at the time the decision is made." R. S. 1894, section 638 (R. S. 1881, section 626); *Fletcher v. Waring*, 137 Ind. 159, and authorities there cited.

The third assignment of error was designed to present the same question, and must fail for reason just stated.

The fourth assigned error is "in overruling appellants' motion to find the facts specially involved in the issues, between the plaintiffs and William J. Stamp." As we have shown, there were two motions by the appellants, either of which and the ruling

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thereon, answers the specification so stated. While it may be regarded as extremely doubtful if the specification of error is sufficiently definite, in the light of the record, we think it entirely certain that the alleged error could only be raised upon motion for a new trial, and not upon motion addressed to the special finding. *Bunch v. Hart*, 138 Ind. 1; *Tewksbury v. Howard*, 138 Ind. 103; *Sharp v. Malia*, 124 Ind. 407.

Facts not specially found are, under our practice, presumed to be found against the party on whom rests the burden of proving such facts. If the finding of the court is against the evidence, that question is made upon motion for a new trial.

The only remaining cause for error assigned is the action of the trial court in overruling the motion of the appellants for a new trial. Of the causes for a new trial, stated in the motion therefor, the appellants present, in addition to that already referred to, but one, namely: That the finding of the court was contrary to the evidence. The appellees object to a consideration of this question for the reason, as stated, that the bill of exceptions was not filed within the time allowed, ninety days from May 2, 1894, but was presented to the judge September 11, and signed and filed October 1, more than one hundred and twenty days. The motion was filed during the term at which the decision was made, as required by section 570, R. S. 1894 (section 561, R. S. 1881), and the exceptions upon which the motion was predicated were carried "forward to the time of ruling on such motion." R. S. 1894, section 638.

The time granted by the court for the filing of the bill could not curtail the time allowed by the statute.

The appellants' insistence, upon the evidence, is, as we understand their learned counsel, that the mortgagor, Stamp, remained in possession of the mort-

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gaged property and made daily sales therefrom, the proceeds of which averaged \$8.00 per day; that the daily expenses averaged \$4.00; that for the period of one hundred and seventy-six days, from the execution of the mortgage, he received, less the expense of operating, \$704.00. These facts, it is claimed, worked a payment of the mortgage debt of \$500.00, and freed the property from the lien of the brewing company. Counsel says: "I understand the law to be well settled that where a mortgagee permits the mortgagor to conduct the business, selling the mortgaged property and using the proceeds for his own use, that he stands in the relation of agent to the mortgagee, and the net proceeds of the business is a payment to be applied upon the mortgage, whether the parties actually apply it or not." The authorities relied upon in support of this position are *Muncie Nat. Bank v. Brown*, 112 Ind. 474; *New v. Sailors*, 114 Ind. 407, 5 Am. St. Rep. 632; *Mayer v. Feig*, 114 Ind. 577; *Peabody v. Landon*, 15 Am. St. Rep. 912.

The case of *Muncie Nat. Bank v. Brown*, *supra*, has no reference to the effect of an express or implied agency in or for the sale of mortgaged chattels, or as to the legal presumption of the payment of the debt from the proceeds of sales. There the mortgage contained the express authority to sell, and required an accounting to the mortgagee. The proceedings, instituted within three or four days of the execution of the mortgage, attacked the validity of the mortgage, because of that express authority to sell and account for the proceeds. This court held the mortgage not invalid.

In *New v. Sailors*, *supra*, and *Meyer v. Feig*, *supra*, the questions were as to the validity of the mortgages; each mortgage containing an express authority to sell the chattels and to account to the mortgagee for the proceeds. While in each case the mortgage was held

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not fraudulent for that reason, it was said that the law will imply a payment upon the mortgage debt to the extent of the net proceeds of the sales made pursuant to such agreement. There are several reasons why the doctrine so stated has no application in this case. The mortgage in question covered certain pool and billiard tables with attachments, and certain counters and other saloon furniture and fixtures, with the additional items of "cigars and tobacco, wines and liquors of all kinds contained in his said business." The privilege of selling any of the property was not given in the mortgage, but was expressly denied and made a condition of forfeiture of possession to the mortgagee. There was no evidence of the sale of any of the property covered by the mortgage, but that which is so construed by the appellant was as follows: "After this mortgage and after these executions were levied, you went on in business there, did you? Yes, sir. Buying goods and selling goods? Yes, sir. And you continued that until the 8th of August? Yes, sir. Isn't it true that during that time your average sales was \$8.00 a day? Yes, sir; somewhere near that. You used that there in your business? Yes, sir. None of it went to Kamm & Schillinger on this mortgage, did it? No, sir. You bought goods and would sell them out there? Yes, sir. And none of it went to Kamm & Schillinger on their mortgage? No, sir."

We think the trial court would not have been permitted to draw the inference from this evidence that any of the tables, fixtures, and furniture had been sold, and it is not an unreasonable inference, from this evidence, that the sales so averaging \$8.00 per day were from goods bought and sold after the execution of the mortgage and not covered by it. Even if we could conclude that the sales mentioned included the cigars, tobacco, and liquors covered by the mortgage,

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the items were of but nominal value, to-wit: \$5.00, as shown by the uncontradicted evidence of a witness offered by the appellants.

As to an implied authority to make sales, a question not discussed by counsel, the evidence does not disclose a knowledge, or an opportunity for knowledge on the part of the mortgagee, that any of the mortgaged property was being sold.

There is evidence tending to establish a conditional sale by Stamp, of the property covered by the mortgage to Reeves & Beebe, in which the purchasers paid certain moneys to the mortgagee and executed to the mortgagee and to Stamp certain notes, representing the balance of the agreed purchase-price. There is also evidence that the condition was broken and that the sale failed. Of this transaction, however, it is not claimed that it constituted an actual payment of the mortgage indebtedness. However, if it had been so claimed, we find the evidence in conflict and confusion as to whether the payment made and the notes executed were for the purchase-price of the property, and the question of weighing the evidence and passing upon that conflict was for the trial court.

Finding no available error in the record, the judgment of the circuit court is affirmed.

TRON ET AL. v. YOHN, ADMINISTRATRIX.

[No. 17,602. Filed March 31, 1896. Rehearing denied June 10, 1896.]

PRACTICE. — *Counter-claim. — Admissibility of Evidence under General Denial. — Foreclosure of Mortgage.* — In an action to foreclose a mortgage given for the purchase-money of real estate, evidence of the difference in quantity of the land as claimed to have been represented by grantor and that conveyed by her, is not admissible in defense of such action under general denial.

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APPEAL AND ERROR.—*Assignment of Error*.—Answers to which demurrers have been sustained are not a part of the record and cannot be considered on appeal without assignment of error.

SAME.—*Record of Evidence*.—Where the longhand manuscript of the evidence is not verified by the certificate of the judge, and has but the authentication of the stenographer's signature, the same will not be considered on appeal.

From the Marion Circuit Court. *Affirmed*.

Cropsey & Marshall, for appellants.

J. T. Lecklider, for appellee.

HACKNEY, C. J.—The appellee, as administratrix of the estate of James C. Yohn, sold to the appellant Tron certain real estate, and took from him and his wife a purchase-money mortgage. To foreclose that mortgage this suit was instituted. The appellants answered in five paragraphs, the first of which was a general denial, and the remaining four sought to recoup from the agreed purchase-price a sum alleged to represent the difference in value of the land, in the quantity, as represented and sold by the appellee, and that actually conveyed. The trial court sustained the appellee's demurrer to the affirmative paragraphs of answer, and the cause proceeded to trial upon the complaint, a supplemental complaint, and the answer in denial, and a decree was rendered in favor of the appellee. The only assigned error is upon the action of the trial court in overruling the motion of the appellants for a new trial.

The question arising upon the argument of counsel for the appellants is as to the admissibility of certain evidence offered on behalf of the appellants, and rejected by the trial court. The rejected evidence would have tended to prove the difference in quantity of the land, as claimed to have been represented by the appellee and that conveyed by her. If the offered evi-

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dence were in the record we are unable to observe its pertinency to the issue as made. Counsel do not advise us as to how such evidence could be admitted, on behalf of their client, under the general denial. The relief sought by the evidence was of an affirmative character, as much so as payment, set-off, settlement, accord and satisfaction, or account stated. It was in the nature of a counter-claim, which is defined by statute to be "Any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages." R. S. 1894, section 353. The pleading, denominated a counter-claim, is in the nature of a complaint against the plaintiff. *Branham v. Johnson*, 62 Ind. 259; *Wills v. Browning*, 96 Ind. 149; *Brower v. Nellis*, 6 Ind. App. 323; R. S. 1894, section 350.

Incidentally, there is some discussion by counsel of the facts pleaded in the affirmative answers, but the practice is well settled that we cannot consider the answers for any purpose. The court having sustained a demurrer to them, they went out of the record for all purposes, unless the appellants had seen proper to have brought them into the record, upon assignment of error, to question the ruling of the court in so sustaining said demurrer. It is the settled practice that a ruling not assigned as error in this court cannot be reviewed.

But, if the answers were in the record, or if the issue had been made in the lower court, there is more than a doubt that the evidence is not in the record, and that we cannot know, in a proper manner, that the evidence in question was offered and rejected. The transcript contains, in the order stated, the complaint, supplemental complaint, answer, demurrer, ruling upon demurrer, trial, and decree. Then follows

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a motion for a new trial, consisting of eight reasons or causes. As a part of the fourth cause, is set out bodily what purports to be a longhand copy of the stenographic report of the evidence given and rejected. Following the motion is the ruling of the court upon the same, with an allowance of sixty days for filing bills of exceptions, and a prayer for an appeal to this court. Immediately following that entry is this statement: "And now, on the 26th day of March, 1895, and within the time given by the court, the said defendants tender this, their bill of exceptions, and pray that the same may be signed, sealed, and made a part of the record, which is accordingly done, this 26th day of March, 1895." This statement bears the signature of the trial judge.

If the longhand manuscript of the evidence is in the record, it is only by finding a place within the motion for a new trial. In that position it has but the authentication of the stenographer's signature, and is not verified by the certificate of the judge. The statement above quoted, while in the language usually employed in concluding a bill of exceptions, has no apparent connection with any other part of the proceedings, and from the transcript we are unable to discover the beginning, or caption, of what might be deemed a bill of exceptions. It is true, that the longhand manuscript begins with the usual words of a bill of exceptions, but to regard that as the beginning of the bill renders it necessary to go into the body of the motion for a new trial for a part of the bill, and include several, and exclude several of the causes for a new trial, and, having done so, add one or two order-book entries before finding the conclusion of the bill. As to the filing of any bill of exceptions with the clerk, the record is silent. A bill of exceptions, to merit the attention of the court, should be capable of discovery

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in the record, without requiring a search of the four corners of the transcript, and the gathering together of such fragments as might appear suitable to such bill, and without tearing asunder motions for a new trial, or other connected single documents or entries. *Etter v. Armstrong*, 46 Ind. 197; *Bement v. May*, 135 Ind. 664; *Morrison v. Morrison*, 144 Ind. 379; *Gray v. Singer, Admr.*, 137 Ind. 257.

The novelty here employed to lend confusion to the record and to disguise a possible bill of exceptions, surpasses anything we have met with in that line.

But if the question argued were properly before us, it may be suggested that, independently of the question of pleading, it would not commend itself to our very serious consideration, owing to the fact that a breach of warranty in an administrator's deed has rarely been regarded as one of the possibilities.

The judgment of the trial court, therefore, is affirmed.

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[No. 17,888. Filed May 5, 1896. Rehearing denied June 10, 1896.]

145 276
4157 575

CRIMINAL PROCEDURE.—*Affidavit and Information.*—*Sufficiency of Under Motion in Arrest of Judgment.*—An affidavit and information for an assault with intent to commit the crime of larceny, which does not allege that defendant attempted to perpetrate a violent injury, or that he had the ability to commit the injury is sufficient to withstand a motion in arrest of judgment.

From the St. Joseph Circuit Court. *Affirmed.*

J. W. & J. E. Talbot, for appellant.

W. A. Ketcham, Attorney-General, and *J. C. Richter*, for State.

MONKS, J.—Appellant was tried and convicted upon

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an affidavit and information, charging him with an assault on one William Cassiday, with intent to commit the crime of larceny. At the proper time the appellant filed a written motion in arrest of judgment, assigning as a cause therefor "that the facts stated in the affidavit and information do not constitute a public offense," which motion was overruled by the court.

This action of the court is assigned as error.

That part of the information necessary to the decision of the question presented is as follows: "George Woodworth, on the 11th day of June, 1895, at and in the county of St. Joseph, and State of Indiana, did then and there unlawfully and feloniously make an assault upon the person of one William Cassiday, with the intent then and there, unlawfully and feloniously to steal, take and carry away," etc.

An assault is defined by statute as follows: "Whoever, having the present ability to do so, unlawfully attempts to commit a violent injury on the person of another, is guilty of an assault." Section 1910, R. S. 1881 (section 1983, Burns's R. S. 1894).

The statute upon which this prosecution is based is as follows: "Whoever perpetrates an assault or an assault and battery upon any human being, with intent to commit a felony, shall, upon conviction thereof, be imprisoned in the State prison not more than fourteen years nor less than two years, and be fined not exceeding \$2,000.00." Section 1909, R. S. 1881 (section 1982, Burns' R. S. 1894).

It is insisted by appellant that "the facts stated in the information do not constitute a public offense for the following reasons:

"1. It does not contain an allegation that appellant attempted to perpetrate a violent injury on the person of William Cassiday.

"2. It contains no allegation that appellant, at the

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time of the alleged assault, had the present ability to commit injury upon the person of William Cassiday."

We think the information would not have been sufficient to withstand a motion to quash had such motion been made at the proper time in the court below. It is settled by the decisions of this court, that to withstand a motion to quash an information for an assault with intent to commit a felony, it must be averred that the defendant unlawfully attempted to commit a violent injury on the person named, and that he had the present ability so to do. *Adell v. State*, 34 Ind. 543.

There are many defects and uncertainties, however, in criminal pleading which would be fatal on a motion to quash, which are not available on a motion in arrest. *Cumpton v. State*, 140 Ind. 442, and cases cited. The rule at common law is thus stated in 1 Bishop Crim. Proced., section 707a: "At common law, the verdict cures some things, as to which the rule is the same in criminal causes as in civil. It is that though a matter either of form or of substance is omitted from the allegation or is alleged imperfectly, yet if under the pleadings the proof of it was essential to the finding, it must be presumed after the verdict to have been proved, and the party cannot now for the first time object to what has wrought him no harm." See *Quick v. Miller*, 103 Pa. St. 67; *Heymann v. Reg*, 12 Cox C. C. 383; *Reg v. Goldsmith*, 12 Cox C. C. 479.

An assault is defined by section 1910 (1983), *supra*, as an unlawful attempt to commit a violent injury on the person of another, coupled with the present ability to commit such injury, and it was in this sense that the word was used in the information. And the same, therefore, contained all the essential elements of the offense, although defectively stated. While this,

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under our decisions, was not the proper way to allege the assault, yet the issue joined by the plea of not guilty was such as necessarily required proof on the trial of all the elements of an assault, without which it will not be presumed that the jury or the court would have found the defendant guilty. *Quick v. Miller, supra*; *Weinberger v. Shelly*, 6 W. & S. 336.

Besides, the information charges a public offense in the language of the statute (section 1909, 1982, *supra*), although not in language as specific and particular as required by the decisions of this court, but this is all that is required as against a motion in arrest of judgment.

In *Wall v. State*, 23 Ind. 150, on 151, which was a prosecution for an assault with the intent to commit murder, the indictment charged that the defendant "did unlawfully and feloniously make and perpetrate and assault, upon the body of one M. L. T. *by*, with the intention then and there, him, the said M. L. T., feloniously, purposely, etc., to kill and murder." * * * This indictment was held sufficient to withstand a motion in arrest of judgment.

It is true, that at the time the offense in the case of *Wall v. State, supra*, was committed our statute did not define the offense of assault. The rule is, however, that when the statute does not specifically define the offense the common law definition will be adopted. *State v. Berdett*, 73 Ind. 185; *Burk v. State*, 27 Ind. 430.

An assault at common law was defined to be an attempt or offer, with force or violence to do a corporal hurt to another, coupled with a present ability or actual violence against his person. 1 East P. C. 406; 1 Russel Crimes (9th ed.), 1019; Roscoe's Crim. Ev. 304; *Stephens v. Myers*, 4 C. & P. 349. It seems, therefore, that an assault at common law was defined the same substantially as by our statute.

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Appellant was fully advised by the information of the crime with which he was charged, and was bound to know the section of the statute upon which it was predicated. If he desired a more specific and definite statement of the offense, his remedy was by motion to quash. The general rule is that all objections, not jurisdictional, must be made at the first opportunity, or they will be deemed waived. The policy of the law is that a party shall not be permitted to take the chance of a favorable result, and then if disappointed for the first time complain.

Section 1891, R. S. 1881 (section 1964, Burns' R. S. 1894), provides that "In the consideration of questions which are presented upon an appeal, the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action in the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant."

The pleading, as we have shown, was broad enough to admit proof of all the elements of the crime charged, and we must, therefore, after verdict, presume such proof was made. 1 Bishop Crim. Proced., section 707a.

The action of the court below, in overruling the motion in arrest, did not prejudice the substantial rights of the appellant.

Judgment affirmed.

HOWARD, J., was absent during the consideration and decision of this case.

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145	281
156	56

[No. 16,919. Filed June 11, 1896.]

EXECUTORS AND ADMINISTRATORS.—*Authority to Mortgage Estate to Pay Debts.—Petition to Sell.*—Where an administrator has petitioned for an order to sell real estate to pay debts of an estate, an order directing such administrator to mortgage such real estate is invalid.

From the Boone Circuit Court. *Affirmed.*

T. J. Terhune and P. H. Dutch, for appellant.

R. P. Davidson and Artman & Lewis, for appellees.

MCCABE, J.—George Kernodle died testate, in Boone county, seized of certain lands therein, and leaving a widow, now Laura A. Neal, and children, Joanna, now Baker, William H., Charles and Jennie Kernodle, to each of whom he devised certain interests in his lands.

That afterwards, on December 13, 1888, said widow and children filed their complaint in the Boone Circuit Court against Thomas H. Martin, administrator *de bonis non*, with the will annexed of the said estate of said George Kernodle, deceased, and Addison B. Braden, seeking to set aside a mortgage for \$400.00 on a part of said real estate, executed by said administrator to said Braden, under an alleged order of the Boone Circuit Court, to secure a loan made to said administrator by said Braden to be used in the payment of the debts of said testator.

That court sustained separate demurrers to said complaint by each defendant Martin and Braden for want of sufficient facts. Braden, the mortgagee, filed a cross-complaint against the original plaintiffs and Martin, administrator, seeking to foreclose his mort-

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gage. The issues joined upon the cross-complaint, were tried by the court, resulting in a general finding in favor of cross-complainant Braden, and against the original plaintiffs and the administrator, upon which cross-complainant had judgment of foreclosure over a motion for a new trial. On March 27, 1891, said former widow and children filed a complaint to review said judgment, making a transcript of said judgment an exhibit to their complaint. They assigned the rulings upon the demurrer to their former complaint, the insufficiency of the facts stated in Braden's cross-complaint, and the denial of their motion for a new trial of the former suit as the errors upon which their complaint to review was based.

James G. Edwards, who was sheriff, and who executed the foreclosure decree by selling the lands to Braden at sheriff's sale, took an assignment of Braden's certificate of purchase, which he had executed to Braden; and Edwards, as appeared and on a showing of such facts, obtained leave of the circuit court to become a defendant in the complaint to review.

The court, trying the issue upon the complaint to review, made a special finding of the facts, upon which it stated conclusions of law, leading to judgment reversing the judgment to be reviewed as to all the parties except the widow, Laura A. Neal.

Many errors are assigned, but only one has been discussed by appellant's counsel, and that is the conclusion of law stated, that the cross-complaint of Braden did not state facts sufficient. All other alleged errors are deemed waived by such failure.

The transcript in this case is in such a condition that we would be fully justified in dismissing the appeal. It is so disjointed, confused, mixed, and imperfect that we doubt if ever so defective a transcript was pre-

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sented to this court before, and certainly no case was ever decided upon its merits presented by such a transcript. It resembles more the trail of a man lost in a snowstorm on the prairie, traveling in a circle all night, than anything else. The conclusion of law assigned for error and discussed, requires an examination of the sufficiency of the cross-complaint of Braden.

As to the execution of the mortgage, the cross-complaint alleges "that on the 10th day of September, 1885, said Thomas H. Martin, as administrator *de bonis non* of the estate of George Kernodle, deceased, had pending in the circuit court of said county of Boone, in said State, his application to sell the southwest quarter of section 7, in township 19 north, range 1 west, in said county * * *; that in said proceedings, instead of selling said real estate, said Martin was ordered to mortgage said real estate to raise money to pay the debts of the estate of said George Kernodle, deceased; and, in pursuance of said order, said Martin mortgaged said real estate to this cross-complainant, Addison B. Braden."

The validity of this same order was brought before this court by the same administrator in *Martin, Admr., v. Neal*, 125 Ind. 547. It was there said that: "The appellant Thomas H. Martin was appointed administrator *de bonis non* of said estate * * * and on the 27th day of February, 1884, filed a petition asking an order for the sale of all said farm, and that the proceeds remaining after the payment of debts be distributed to the devisees or invested in real estate as the court might direct. * * On the 26th day of June, 1885, * * * the court * * * made an order authorizing said administrator *de bonis non* to mortgage said real estate, and to take possession of and lease the same for a period not to exceed five years. After-

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wards, on the 10th day of September * * * * the court * * * made an order authorizing the administrator to negotiate a loan at eight per cent. interest. * * * Afterwards the administrator reported the making of such loan, and the mortgage executed to secure the same, to the court, * * * and the court approved the loan, mortgage, and lease. * * *

"The circuit court probably has jurisdiction of the subject-matter, and the right to make an order, in a proper case, for the administrator to mortgage and lease real estate, instead of ordering it sold; but in such case it would be incumbent on the administrator to show to the court that it would be to the interest of the estate to thus mortgage or lease the real estate, and manifestly the heirs, or owners, of the real estate would have the right to controvert the fact that it was to the interest of the estate. * * * It affirmatively appears that it was sought to graft it into and make it a part of the proceedings for the sale of real estate after such proceedings had been heard, and order of sale made, so that unless we shut our eyes to the facts as disclosed by the record, we must know from the record that no notice whatever was given of the application to mortgage and lease the real estate, and for this reason the judgment is void and may be attacked collaterally. * * * It cannot be sustained, unless it is a part of the proceedings to sell real estate; and we are of opinion that it is not. The original application was for the sale of the real estate to pay debts; nothing was said about mortgaging or leasing."

All of the facts that appear in that case do not appear by the cross-complaint in question, though they do appear in the record of the proceedings sought to be reviewed.

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But the sufficiency of the cross-complaint must be tested by the facts stated in it.

And it shows that on application to sell by the administrator the lands of the decedent, "instead of selling said real estate, said Martin was ordered to mortgage said real estate to raise money to pay debts of the estate."

It is true, that it does not appear from the cross-complaint that there was no notice to the widow and children, as it did in the other case, but it does appear that the order to mortgage was not made in accordance with the application. That application, the cross-complaint states, was to sell, and not to mortgage. It may be, as counsel contend, that in considering the sufficiency of the cross-complaint, which is silent as to notice to the widow and heirs, that we are bound to presume that notice was given, contrary to the disclosure of other parts of the record. Yet, we may inquire whether the adjudication by which it is sought to conclude the widow and heirs was within the subject-matter submitted to the court for its determination.

In *McFadden v. Ross*, 108 Ind. 512, at pages 516, 517, it was said: "The proposition, that the judgment of a court having jurisdiction of the parties and the subject-matter, is conclusive, has become a settled maxim of the law. This, however, means nothing more than that such judgment is conclusive upon all questions which were, or might have been, litigated and determined within the issues before the court. Neither reason or authority lends any support to the view, that because suitors have submitted certain designated matters to the consideration of a court, the tribunal is thereby authorized to determine any other matter in which the parties may be interested,

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whether it be involved in the pending litigation or not. 'Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises,' " citing *Munday v. Vail*, 34 N. J. 418; *Fairchild v. Lynch*, 99 N. Y. 359; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Wood v. Jackson*, 8 Wend. 9, 22 Am. Dec. 603; *Smith v. McCool*, 16 Wall. 560; *Bigelow Estop.*, 92. To the same effect are *Indianapolis, etc., R. W. Co. v. Center Tp.*, 130 Ind. 89; *Mitchell v. French*, 100 Ind. 334; *Hays v. Carr, Admr.*, 83 Ind. 275; *Hutts v. Martin*, 134 Ind. 587; *Freeman Judgments* (4 ed.), section 120; 21 Am. and Eng. Ency. of Law, 232, 233 and authorities therecited; *Ringgenberg v. Hartman*, 124 Ind. 186; *Whitney v. Marshall*, 138 Ind. 472, 478.

The cross-complaint shows that the propriety and necessity of mortgaging the real estate of the decedent was not submitted to the court, but the propriety and necessity of selling it was submitted. And, as was said in *Martin v. Neal*, *supra*, "the statute authorizing a sale is separate from that authorizing the court to license administrators to mortgage and lease. Different facts are required to be proven to obtain the order."

Therefore, the cross-complaint did not state facts enough to show that the order was a valid one, and for that reason, if for no other, the circuit court did not err in its conclusion of law to that effect.

Judgment affirmed.

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[No. 17,612. Filed June 11, 1896.]

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HUSBAND AND WIFE.—*Marriage.*—*Common Law Rule.*—At common law a valid marriage made the husband and wife one person in law. The legal existence of the woman was suspended or merged in that of her husband.

SAME.—*Ante-Nuptial Injuries by Husband.*—*Action.*—*Common Law Rule.*—The common law rule that marriage extinguished all rights of action in favor of the wife against the husband for ante-nuptial injuries to her person or character has not been abrogated in this State.

SEDUCTION.—*Marriage.*—*Divorce.*—*Statute Construed.*—Under section 264, Burns' R. S. 1894, which gives an unmarried woman a right of action for damages for her own seduction, a woman under the age of 21 years who has been seduced, and legally marries her seducer, and afterwards procured a divorce, cannot then maintain an action for damages against him.

MARRIAGE.—*Fraudulent Marriage Voidable.*—A marriage which is procured by fraud is voidable at the suit of the injured party, and may be declared void by judicial decree; and for such purpose the courts have jurisdiction independently of any divorce law.

SAME.—*Girl Under Sixteen Incapable of Entering Into Marriage Contract.*—*Ratification.*—A girl under the age of sixteen years is legally incapacitated from contracting marriage, and may have her marriage annulled on that ground unless she ratified the marriage after she arrived at the age of sixteen.

SEDUCTION.—*Voidable Marriage.*—*Decree of Nullity.*—*Statute Construed.*—Under section 264, Burns' R. S. 1894, a woman who has been seduced and marries her seducer, and the court afterwards on her application, adjudges that her marriage was void, can, after such decree, bring and maintain an action against him for said seduction.

From the Allen Superior Court. *Reversed.*

S. M. Hench, for appellant.

Randall & Doughman, for appellee.

MONKS, C. J.—Appellant brought this action against appellee to recover damages for her own

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seduction, under the provisions of section 263, R. S. 1881 (section 264, R. S. 1894). Appellee's separate demurrer to each paragraph of the amended complaint for want of facts was sustained. Appellant refused to plead further, and judgment was rendered against her. This action of the court is assigned as error.

It is urged by appellee that the specifications in the assignment of errors are not directed to the ruling on each paragraph, but to the complaint as an entirety. While the specifications in the assignment are not as certain as they could have been made, yet we think they call in question the ruling of the court upon each paragraph of the complaint.

The question presented by the demurrer to the first and second paragraphs of the complaint, is whether a woman under the age of twenty-one years, who has been seduced, and marries her seducer, and afterwards procures a divorce, has, after said divorce is granted, a cause of action against him for damages for said seduction under the provisions of section 263 (264), *supra*.

Section 263 (264), *supra*, provides that: "Any unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages as may be assessed in her favor."

It was held by this court, in *Dowling v. Crapo*, 65 Ind. 209, that an action for the seduction of an unmarried female was not barred by her subsequent marriage to a person other than her seducer. That the term "unmarried," used in the statute, relates to the time of the seduction, and not to the time of the commencement or trial of the action.

At common law a valid marriage made the husband and wife one person in law. The legal existence of the woman was suspended or merged in that of the husband. 1 Blackstone Comm. 442, 443; Coke Litt. 112

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b.; 2 Kent Comm., p. 129; Schouler Husband and Wife, section 6.

The husband, by virtue of the marriage, was entitled to all the personal property and choses in action of his wife, which, when reduced to possession, becomes his absolute property, and was also entitled to the exclusive possession, use, and control of her real estate during their joint lives. The marriage extinguished all debts and causes of action for ante-nuptial wrongs between the parties. *Long v. Kinney*, 49 Ind. 235; *Flenner v. Flenner*, 29 Ind. 564; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236; 9 Am. and Eng. Ency. of Law, 795 and note 5.

They could not sue one another, nor did any cause of action arise in favor of either by reason of any injury to the person or character committed by the other.

Kujek v. Goldman, 29 N. Y. Sup. 294; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Note to Commonwealth v. Barry*, 2 Green Crim. Law Rep. 285; *State v. Oliver*, 70 N. C. 60; *Peters v. Peters*, 42 Ia. 182; *Libby v. Berry*, 74 Me. 286; Dicey Parties, star. p. 173.

The husband was liable for his wife's ante-nuptial torts and contracts, and also for her torts committed during coverture, including those committed out of his presence and without his directions. *Ferguson v. Collins*, 8 Ark. 241; *Brown v. Kemper*, 27 Md. 666; *Hubbell v. Fogartie*, 3 Rich. (S. C.), 413; *Allen v. McCullough*, 2 Heisk (Tenn.), 174; *Heard v. Stamford*, 3 P. Wms. 409; *Hawk v. Harmon*, 5 Binn. (Pa.) 43; *Bell v. Bennett*, 21 Ind. 427, 83 Am. Dec. 366; *Baker v. Young*, 44 Ill. 42; 9 Am. and Eng. Ency. of Law, 823-825; Dicey Parties, C 30 rule 107, p. 477.

For choses in action accruing to the wife during
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coverture, the husband could sue alone, but for her ante-nuptial choses he was required to join his wife as a co-plaintiff in the suit. *Tucker v. Gordon*, 5 N. H. 564; *Boozar v. Addison*, 2 Rich. Eq. 273, 46 Am. Dec. 43 and note 47-51; *Thompson v. Ellsworth*, 1 Barb. Ch. 624; *Rumsey v. George*, 1 Maul. and Sel. 176. *Checchi v. Powell*, 6 Barn. and C. 253; *Milner v. Milnes*, 3 T. R. 627.

For injuries to the person or character of the wife, whether committed before or after the marriage, she could bring no action for redress without her husband's concurrence. Such action could only be brought in the name of both for her injuries, and the damages recovered were the property of the husband, and not of the wife. *Throgmorton v. Davis*, 3 Blackf. 383; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72 and note; *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483 and note 484, 485; *Barnett v. Leonard*, 66 Ind. 422; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Smalley v. Anderson*, 2 T. B. Monroe (Ky.) 56, 15 Am. Dec. 121; *Ballard et al. v. Russell*, 33 Me. 196, 54 Am. Dec. 620; *Shaddock v. Clifton*, 22 Wis. 114, 94 Am. Dec. 588, and note 591-594; *Gibson v. Gibson*, 43 Wis. 23, 28 Am. Rep. 527; *Kaime v. Trustees*, 49 Wis. 371; *Reeder v. Purdy*, 41 Ill. 279; *Anderson v. Anderson*, 11 Bush 327; Dicey Parties, C. 16 rule 67, p. 297; *Southworth v. Packard*, 7 Mass. 95.

Any settlement made or discharge given by the husband in such case bound the wife. *Southworth v. Packard*, *supra*; *Beach v. Beach*, 2 Hill 260, 38 Am. Dec. 584; *Ballard v. Russell*, *supra*; *Shaddock v. Clifton*, *supra*.

For the loss of the service and society of his wife, caused by such injuries, the right of action was in the husband alone, and the action to recover therefor

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could only be brought in his name. *Long v. Morrison, supra*; *Brockbank v. Whitehaven*, 7 Hurl. & Nor. 834; *Rogers v. Smith, supra*; *Pollard v. Railroad Company*, 101 U. S. 223, and note. *Shaddock v. Clifton*, 94 Am. Dec. on p. 591.

For the reason that the marriage extinguished antenuptial rights of action for tort or upon contract between husband and wife, the wife could not, after divorce from her husband or his death, maintain an action against him or his estate for any injury to her person or character, committed by him before their marriage or during coverture. *Peters v. Peters, supra*; *Abbott v. Abbott, supra*; *Libbey v. Berry, supra*; *Main v. Main*, 46 Ill. App. 106; 9 Am. and Eng. Ency. of Law, 795, and notes 9, 10; Schouler Husband and wife, section 81.

These rules of the common law are founded upon the principle that the husband and wife are one in law, and not upon the theory that the wife is under legal disability. *Barnett v. Harshbarger, Admr.*, 105 Ind. 410; *Phillips v. Barnett*, 1 Q. B. Div. 436.

The rules of the common law have been greatly relaxed in this State by legislative enactment.

It is provided by section 5116, R. S. 1881 (section 6961, R. S. 1894), enacted in 1852, that: "No lands of any married woman shall be liable for the debts of her husband; but such lands, and the profits therefrom, shall be her separate property, as fully as if she were unmarried: *Provided*, That such wife shall have no power to incumber or convey such lands, except by deed in which her husband shall join."

Section 2488, R. S. 1881, enacted in 1853, provides that "The personal property of the wife held by her at the time of her marriage, or acquired, during coverture, by descent, devise, or gift, shall remain her own

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property to the same extent and under the same rules as her real estate so remains; and on the death of the husband before the wife, such personal property shall go to the wife; and on the death of the wife before the husband, shall be distributed in the same manner as her real estate descends, and is apportioned under the same circumstances." This section was amended in 1891, section 2649, R. S. 1894, but the provision concerning personal property owned by the wife at the time of her marriage remains unchanged.

Section 254, R. S. 1881 (section 255, Burns' R. S. 1894), provides that "A married woman may sue alone.

"First. When the action concerns her separate property.

"Second. When the action is between herself and her husband; but in no case shall she be required to sue or defend by guardian or next friend, except she be under the age of twenty-one years."

Under this section, it is clear a married woman may, as sole plaintiff, sue her husband, or any other person, concerning her separate property. *Adams v. Sater*, 19 Ind. 418; *Gee v. Lewis*, 20 Ind. 149; *Mills v. Winter*, 94 Ind. 329.

The effect of section 254 (255), *supra*, was to leave the common law rule in force, except as to the cases mentioned in said section, in which the wife was authorized to sue alone. *Hamm v. Romine*, 98 Ind. 77, 80.

This court has held that said section 254 (255) did not change the common law rule, that in all actions to recover injuries to the person or character of a married woman, the husband and wife must join as plaintiff. *Barnett v. Leonard*, *supra*; *Rodgers v. Smith*, *supra*; *Long v. Morrison*, *supra*.

Section 5131, R. S. 1881 (section 6976, R. S. 1894), which was first enacted in 1879, provides that "A married woman may bring and maintain an action in her

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own name against any person or body corporate for damages for any injury to her person or character, the same as if she were sole; and the money recovered shall be her separate property, and her husband, in such case, shall not be liable for costs."

While the statutes in this State have removed the disabilities of married women until ability is now the rule, and disability the exception, yet all her disabilities have not been removed. *Barnett v. Harshbarger, supra*; *Rosa v. Prather*, 103 Ind. 191.

As we have shown, the common law rule that marriage extinguished all rights of action in favor of the wife against the husband for ante-nuptial injuries by the husband to her person or character, was founded upon the principle of the unity of husband and wife, and not upon the theory that the wife was under a legal disability. This rule of the common law is in force in this State, unless it has been changed by statute. This court has held that the same has not been abrogated.

In speaking of this rule of the common law, in *Barnett v. Harshbarger, supra*, on p. 413, this court said: "Our decisions declare that it has not been abrogated. In the carefully considered case of *Dodge v. Kinzy*, 101 Ind. 102, it is affirmed that the general rule of the common law respecting the unity of husband and wife has not been overthrown. The decision in *Mathes v. Shank*, 94 Ind. 501, recognizes the rule of the common law, and affirms that it exists except as changed or modified by statute. The doctrine of the Supreme Court of Massachusetts, declared in *Lord v. Parker*, 3 Allen, 127, was adopted in *Haas v. Shaw*, 91 Ind. 384 (46 Am. Rep. 607), and this court quoted with approval from *Lord v. Parker, supra*, the following observations upon the effect of the enabling statute: "They are in derogation of the common law, and cer-

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tainly are not to be extended by construction.' * * * It is for the Legislature, and not the courts, to destroy the rule of the common law declaring the unity of husband and wife. * * * The unity which a settled rule of law has recognized through so many years can not be disregarded, and it prevents the operation of the general statutes removing the disabilities of married women. * * * The question is not whether disabilities have been removed, but whether the long prevailing rule of the law declaring husband and wife to be one person, in legal contemplation, has been annulled." The same doctrine is declared in *Grant v. Green*, 41 Ia. 88; *Newhirter v. Hatten*, 42 Ia. 288, 20 Am. Rep. 618; *Peters v. Peters*, *supra*.

Until this rule is annulled all rights of action for ante-nuptial wrongs of the husband to the wife are extinguished by their marriage.

Statutes relating to the estate or property of the husband and wife do not effect their personal relation, they only change the status and rights of the husband so far as may be necessary to secure to the wife the enjoyment of the rights conferred by such statutes.

Section 254 (255), *supra*, authorizes a wife to sue alone where the cause of action relates to her separate property, and under said section she may sue her husband or any other person or persons concerning such property. *Wilkins v. Miller*, 9 Ind. 100; *Scott v. Scott*, 13 Ind. 225; *Flenner v. Flenner*, *supra*.

Said section changes the procedure, but confers no new right on the wife, and does not, therefore, entitle her to sue her husband for a personal injury to herself, committed by him either before or after their marriage, for the reason that whether a husband is liable to his wife therefor is not a mere question of procedure but of substantial right. *Peters v. Peters*, *supra*; *Libbey v. Berry*, *supra*; *Abbott v. Abbott*, *su-*

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pra; *Phillips v. Barnett, supra*; *McWhirter v. Hatton, supra*; *Grant v. Green, supra*.

It is clear that section 5131 (6976), *supra*, authorizing the wife to bring and maintain an action in her own name for any injury to her person or character, the same as if she were sole, merely changes the procedure, but gives no new right, and only applies to such causes of actions as could only be maintained by the husband and wife as co-plaintiffs before said section took effect. The wife could not, therefore, maintain an action in her own name, under this section, against her husband for any injury to her person or character; besides, the section provides that the husband in such case shall not be liable for costs, and this in express terms indicates that the wife cannot maintain an action in her own name against her husband, under said section.

In 1860 the legislature of New York passed an act (Laws of 1860, Chap. 90, p. 158), by section 7 of which it was provided, "Any married woman may bring and maintain an action in her own name, for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole; and the money received upon the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property." This section was amended by an act passed in 1862 (Laws 1862, Chap. 172), but not in respect to the wife's right to bring an action, as provided in the act of 1860. It was held in *Freethy v. Freethy*, 42 Barb. 641, that a wife could not maintain an action against her husband to recover damages for slander uttered by him, and it was declared that the legislature did not intend by the laws of 1860 and 1862, to which reference has been made, to change the common law rule as to the unity of husband and wife.

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In *Longendyke v. Longendyke*, 44 Barb. 366, it was held, under the same section, that the wife could not maintain an action against her husband for an assault and battery.

In *Shultz v. Shultz*, 89 N. Y. 644, the Court of Appeals followed the foregoing cases and held that the wife could not maintain an action against her husband to recover damages for assault and battery. Section 7, of the act of 1860 and 1862, of New York was more comprehensive than section 5131 (6976), *supra*, because it did not exclude the right of the wife to sue the husband by providing that he should not be liable for costs.

It is evident, from what we have said and the authorities cited, that appellant's right of action against appellee for her seduction was extinguished by their marriage, and that she could not maintain an action against him therefor after her divorce. To the same effect are the cases of *Peters v. Peters*, *supra*; *Libbey v. Berry*, *supra*; *Abbott v. Abbott*, *supra*; *McWhirter v. Hatton*, *supra*; *Grant v. Green*, *supra*.

But counsel for appellant insists "that she obtained the divorce from appellant on the ground that the marriage on the part of the appellee was fraudulent, and that she has a cause of action after said divorce against him for her seduction."

It is true, that it is alleged, in the first and second paragraphs of complaint, that appellee fraudulently married appellant to avoid imprisonment, and that he did not intend to live or cohabit with her as a husband or keep his marriage vows, but to desert her, and that he did, immediately after said marriage, leave, abandon, and desert her, and never lived or cohabited with her after said marriage, and refused to support appellant, although he was able to do so," but it is not alleged that the "divorce" was granted on this ground.

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Without such an averment, it must be presumed that the word divorce was used in its ordinary sense, and that such divorce was granted appellant for some statutory cause. *Miller v. Miller*, 33 Cal. 353.

If, however, it was alleged in said paragraphs that the divorce was granted to appellant from appellee on account of the alleged fraud on the part of appellee, it would be equivalent to an allegation that the court had granted appellant a decree of nullity and adjudged that said marriage was void. Substance, not names or forms, controls in determining the meaning, character, and effect of a pleading or the judgment or decree of a court. Fraud is not a cause of divorce, but a marriage voidable on the ground of fraud may be adjudged void by a court of competent jurisdiction. While the term divorce is not properly applicable to a decree of nullity, yet such a decree is often called a "divorce." 14 Am. and Eng. Ency. of Law, 532; 1 Bishop M. & D. (ed. 1881), section 166.

In 2 Bishop M. & D. (ed. of 1891), section 473, it is said: "Not unfrequently the judicial declaration of nullity is called a 'divorce.' It is properly so where the marriage it declares void was only voidable. For example, it is common and correct language to speak of impotence as a cause for *divorce*. And Blackstone writes that the '*divorce a vinculo matrimonii* must be for some of the canonical causes of impediment.' But the expression 'sentence,' or 'decree of nullity' equally well indicates the legal avoiding of a voidable marriage; and it seems more significant and less liable to be misunderstood than the other, and somewhat better in accord with modern usage."

The question presented by the demurrer to the third paragraph of the amended complaint is whether a woman, who has been seduced and marries her seducer, and the court afterwards, on her application,

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adjudges that said marriage was void, can, after such decree, bring and maintain an action against him for said seduction under section 263 (264), *supra*.

An action for divorce is brought for the purpose of dissolving a marriage, while a nullity suit is brought for the purpose of having a void marriage declared void, or a voidable marriage judicially made void. In the divorce suit the marriage is recognized as valid and adjudged to be dissolved from the date of the decree, but in the nullity suit the marriage is not recognized, but is adjudged void, that is, that there was no marriage, and the rights of the parties are the same as if the marriage had never taken place. 1 Bishop M. & D. (ed. 1891), sections 259, 271. It follows that the rule established in this State that all property questions between husband and wife are presumed to be adjudicated in the decree of divorce does not apply to a decree of nullity, and can, therefore, have no application to this case.

A marriage which is procured by fraud is voidable at the suit of the injured party, and may be declared void by judicial decree. The courts have jurisdiction of such actions independently of any provision of the divorce law. *Bishop v. Redmond*, 83 Ind. 157; *Tefft v. Tefft*, 35 Ind. 44, 50, and cases cited; *Mason v. Mason*, 101 Ind. 25, 28; *Clark v. Field*, 13 Vt. 460, 472; *LeBarron v. LeBarron*, 2 Am. Law Reg. (N. S.) 212; *Ferlat v. Gojon*, 1 Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554; *Gillett v. Gillett*, 78 Mich. 184; *Smith v. Smith*, 51 Mich. 607; *Tomppert v. Tomppert*, 13 Bush. (Ky.) 326, 26 Am. Rep. 197; *Lyndon v. Lyndon*, 69 Ill. 43; *True v. Ranney*, 21 N. H. 52, 53 Am. Dec. 164; *Robertson v. Cole*, 12 Tex. 356; *McKinney v. Clarke*, 2 Swan (Tenn.) 321, 324, 58 Am. Dec. 59; *Willard v. Willard*, 6 Baxt. (Tenn.) 297, 32 Am. Rep. 529; *Carris*

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v. *Carris*, 24 N. J. Eq. 516; 2 Bishop M. & D. (ed. 1891), section 803; 1 Bishop M. & D. (ed. 1891), sections 471, 472, 473, 476, notes 1 and 2, sections 477, 543, 544; Reeve Dom. Rel. 206; 2 Kent Comm. 77; Schouler's Dom. Rel. 35; *Ridgely v. Ridgely* (Md.), 25 L. R. A. 800.

In England the power to annul marriages was exercised by the ecclesiastical courts, and the principles and practice concerning such jurisdiction constituted a part of the common law of that country, and was therefore adopted as the law of this State by statute, section 236, R. S. 1881 (section 236, R. S. 1894). *Tefft v. Tefft*, *supra*.

Courts having the jurisdiction of courts of equity, under the general power, to annul fraudulent contracts, have also jurisdiction to annul a marriage on account of fraud. *Clark v. Field et al.*, *supra*; *Keyes v. Keyes*, 22 N. H. 553; *Burtis v. Burtis*, Hopkins, 557; *Wightman v. Wightman*, 4 Johns. Ch. 343; *Carris v. Carris*, *supra*.

In *Bishop et al. v. Redmond*, *supra*, appellee charged in her complaint that Redmond, one of appellants, married her in the evening and abandoned her the next morning; that prior to the marriage he seduced her, and that she was the mother of a bastard child begotten by him; that, after he had seduced her, he conceived the fraudulent scheme of cheating her by marrying and abandoning her and by conveying before marriage all of his property; that Jacob Bishop, his co-appellant conspired with him in this fraudulent design, and, for the purpose of aiding in carrying it into effect, received a conveyance of land from him; that the conveyance was without consideration and was made to and received by Bishop for the sole purpose of giving effect to the fraudulent scheme to defraud appellee. Prayer that a divorce be granted, alimony awarded, and the fraudulent conveyance set aside.

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This complaint did not state any statutory cause for a divorce, but did state facts sufficient to entitle appellee to a decree of nullity, on the ground of fraud. It was only upon this theory that the action of the trial court could be sustained. The difference between that action and the one at bar is, that in that action, the injured party sought and obtained the decree of nullity and damages, incorrectly called alimony in the complaint and the decree of the trial court, in the same action, while in this the decree of nullity was first procured and the action for damages brought afterwards. It was shown by the evidence in that case that Elijah Redmond had carnal knowledge of appellee in June, 1879, that while appellee was pregnant with child by said Redmond he conveyed the real estate described in the complaint to his co-appellant, Bishop, in November, 1879, that the bastard child was born in March, 1880, and appellee was married to Redmond, the father of said child, in November, 1880, and that the allegations of the complaint heretofore set out were true.

The court below rendered a decree of nullity in favor of appellee, calling it, as is often done, a divorce and a judgment for damages against her seducer, and a decree setting aside the conveyance of the real estate to Bishop, and that the same be sold, which was affirmed by this court on appeal.

The court in that case held that where a conspiracy is formed for the purpose of defeating the claim of a woman for her seduction, in which a fraudulent purpose to marry and then abandon her enters into and forms a part thereof, the claim for damages for the seduction is not defeated by the marriage entered into for the purpose of carrying such scheme into execution. The court said: "The eleventh instruction given by the court was correct. It informed the jury

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that if the evidence satisfied them that the conveyance was made to and accepted by Bishop for the purpose of defrauding the appellee out of any judgment that might be obtained against his grantor, they might find the conveyance to be fraudulent. As we have seen, in examining the complaint, the appellee was a creditor from the time (June, 1879) the right to legal redress accrued in her favor, and if the conveyance was made for the fraudulent purpose of preventing the collection of a judgment rendered in vindication of that right, she was entitled to have it set aside. It is argued that the evidence shows a marriage, and that this had the effect of canceling the prior right, and that, therefore, the rule declared in the instruction is not applicable. There was, however, evidence fully justifying the inference that the marriage was, as the complaint charges, one of the steps in the fraudulent scheme to defeat the claim of appellee, and was contracted solely for the purpose of carrying it into effect. If the marriage was entered into for this corrupt purpose, and there was an abandonment of the appellee pursuant to the preconceived design to defraud her, it did not defeat the claim for damages for the original wrong." What was the original wrong? The seduction of appellee by Redmond, one of the appellants. Of course, the right of appellee to recover damages against Redmond and set aside the conveyance to Bishop, depended upon whether a decree of nullity (called a divorce in the complaint and decree) was granted to him.

If appellee, in the case at bar, as alleged, did not intend to live and cohabit with appellant, or have any sort of marital intercourse with her when the marriage ceremony was performed, but merely went through the formalities to avoid imprisonment for bastardy and prosecution for seduction, and immedi-

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ately left and did not perform his marriage vows, the marriage was voidable at the election of appellant upon the discovery of such fraud, and she was entitled to bring an action against appellee and have the same declared void by judicial decree. *Bishop et al. v. Redmond, supra*, and authorities cited above; 1 Bishop M. & D. (ed. 1891), sections 473, 476, note 2, section 477, 327-339.

After such decree had been rendered she had the right to sue appellee for her seduction, the same as if she had never been married to him.

It also appears from the allegations in the third paragraph of the amended complaint, that appellant was, when married to appellee, under the age of sixteen years, and was therefore incapable on that account of contracting such marriage with appellee. Section 5324, R. S. 1881 (section 7289, R. S. 1894). It is provided by section 1025, R. S. 1881 (section 1037, R. S. 1894), that when either of the parties to a marriage shall be incapable, from want of age, of contracting such marriage, the same may be declared void on application of the incapable party by any court having jurisdiction to decree divorces.

It is clear that appellant was also entitled to have her marriage to appellee annulled on this ground, unless she ratified said marriage after she arrived at the age of sixteen years. 14 Am. and Eng. Ency. of Law, 487, 489; *Shaffer v. State*, 20 Ohio 1; *McDowell v. Sapp*, 39 Ohio St. 558; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; Stewart Marriage and Div., sections 57, 58.

It is the policy of the law in this State, however, that children born or begotten during the existence of a voidable marriage are considered legitimate, even though such marriage is adjudged to be void by a

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court of competent jurisdiction. Section 1025 (1037), *supra*.

It is not material, however, upon what ground the decree of nullity was granted to appellant, for the court had jurisdiction, and the decree, even if erroneous, is binding on appellant and appellee, and cannot be questioned in this case. Nothing in the opinion is in conflict with the doctrine declared in *State v. Otis*, 135 Ind. 267, cited by appellee. In that case this court held that in case of the seduction of a female under the age of twenty-one years, under promise of marriage, in violation of the provisions of section 1992, R. S. 1881 (section 2078, R. S. 1894), the subsequent marriage of the parties was a bar to the further prosecution for such crime. The wife in that case had not attempted to have the marriage set aside for fraud, and the marriage was therefore binding upon the parties, and all other persons, including the State, until its nullity was declared by a competent tribunal. *Tomppert v. Tomppert*, *supra*.

If the wife, in that case, had obtained a decree of nullity against Otis, it would have been a judgment of the court that no marriage had ever existed between them, and the fact that there had been a marriage voidable at the election of the wife would not have been available as a defense by Otis after such decree of nullity.

It follows that the court erred in sustaining the demurrer to the third paragraph of the amended complaint.

Judgment reversed, with instructions to overrule the demurrer to the third paragraph of the amended complaint, with leave to file an amended and additional paragraph of complaint if desired, and for further proceedings in accordance with this opinion.

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[No. 17,757. Filed June 11, 1896.]

POLICE COURT.—*Jurisdiction.*—*Petit Larceny.*—*Indianapolis City Charter.*—*Statute Construed.*—Sections 8887-8891, Burns' R. S. 1894, as amended by the Act of 1895, p. 90 (*Indianapolis City Charter*, sections 116-120), conferring upon the police judge original concurrent jurisdiction with the criminal courts in all cases of petit larceny, and all other violations of the laws of the State where the penalty provided therefor cannot exceed a fine of \$500.00 and imprisonment not exceeding six months, is valid.

SAME.—*Jurisdiction.*—*Criminal Law.*—*Indianapolis City Charter.*—*Statute Construed.*—The jurisdiction of the police court, authorized by section 118 of the *Indianapolis City Charter*, empowering it to impose a fine and imprisonment, is not affected by the fact that the general statute fixes the punishment for petit larceny at imprisonment, fine and disfranchisement.

SAME.—*Right of Trial by Jury.*—*Constitutional Law.*—The right of trial by jury guaranteed by the constitution, is not violated by the statute empowering the police judge, in case he shall deem the punishment he is authorized to assess, inadequate for the offense, to hold the prisoner to bail for appearance before the proper court.

CONSTITUTIONAL LAW.—*Special Acts.*—*Courts of Inferior Jurisdiction.*—The constitution does not prohibit special acts creating courts of inferior jurisdiction.

From the Marion Superior Court. *Affirmed.*

Harding & Hovey, for appellant.

HOWARD, J.—By the judgment of the police court of the city of Indianapolis, the appellant was convicted of the crime of petit larceny, was fined \$25.00, and sentenced to the Marion County workhouse for thirty days. Thereupon he began this action by filing in the Marion Superior Court his petition for a writ of habeas corpus, alleging that the judge of the police court had no authority to try him for the offense charged, or to fine or commit him therefor.

The court, on hearing the evidence, found that the appellant was lawfully in custody of the appellee, as

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superintendent of the workhouse, and remanded him to undergo his sentence.

In appellant's exceptions to the superintendent's return to the writ, which exceptions were overruled by the court, the contention was that the police judge had "no jurisdiction to try and determine a case of petit larceny."

Appellee has not furnished us with a brief, as we think was his duty, both to the trial court and to this court, as well as to himself. *Walls v. State, ex rel. Aud.*, 140 Ind. 16.

The provisions of the statute under which the judge of the police court assumed to exercise jurisdiction in the case are found in sections 116-120, of the Indianapolis city charter (section 3887-3891, R. S. 1894; Acts of 1891, 137) including also the amendment made in 1895 to section 118 of the charter, Acts, 1895, 90.

In section 118, as amended, the jurisdiction of the judge of the police court is declared as follows:

"He shall have and exercise within such county in which such city is located the powers and jurisdiction now or hereafter conferred upon justices of the peace in all crimes and misdemeanors except as otherwise herein provided. He shall have and exercise within such city the powers and jurisdiction now conferred upon mayors except as herein otherwise provided. He shall have exclusive jurisdiction of all violations of the ordinances of such city. He shall also have original concurrent jurisdiction with the criminal courts in all cases of petit larceny and all other violations of the laws of the State where the penalty provided therefor cannot exceed a fine of five hundred (\$500.00) dollars and imprisonment not exceeding six months, or either or both: *Provided*, That such Police

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Judge, in all such cases of petit larceny, if he find the prisoner guilty, shall assess his punishment; or, if, in the opinion of such Police Judge, the punishment he is authorized to assess is not adequate to the offense he may so find, and in such case the Police Judge shall hold such prisoner to bail for his appearance before the proper court, or commit him to jail in default of such bail."

By section 119 of the charter (section 3890, Burns' R. S. 1894), the penalties that may be imposed in the police court for the violation of any law or ordinance are fixed as follows: "The court or jury shall have power to assess a fine in any sum not exceeding five hundred (\$500.00) dollars, or adjudge imprisonment as a part of the sentence for any time not exceeding six months in the county jail, workhouse or other lawfully designated place of confinement, either or both."

There can be no doubt that under the foregoing sections of the statute, if valid, the police court had power to try the appellant for petit larceny, and, on conviction, to inflict upon him the fine and imprisonment set out in the record. Van Fleet Coll. Att., sections 200, 224, and cases there cited.

By section 1706, Burns' R. S. 1894 (section 1637, R. S. 1881), justices of the peace, in criminal cases, are given jurisdiction co-extensive with their respective counties; this jurisdiction is exclusive where the fine can not exceed \$3.00, and is concurrent with the criminal court and circuit court in cases of misdemeanor punishable by fine only. But they have no power to adjudge imprisonment as a part of their sentence, except as specially provided. Under this section it has been decided that while a justice of the peace has no power to imprison as a part of his sentence, yet, in cases where the punishment provided by statute may be fine and imprisonment the justice has jurisdiction to

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try the case. *Miller v. State*, 72 Ind. 421; *State v. Creek*, 78 Ind. 139.

By section 3497, R. S. 1894 (section 3062, R. S. 1881), the mayor of a city, within the limits of such city, is given the jurisdiction and powers of a justice of the peace in all matters, civil and criminal, arising under the laws of the State; and for crimes and misdemeanors his jurisdiction is made co-extensive with the county. And, in addition, it is provided "that, in trials before him, he shall have power to adjudge imprisonment as a part of his sentence, not exceeding thirty days in the city or county prison." See *State, ex rel., v. Wolever*, 127 Ind. 306.

By section 2007, R. S. 1894 (section 1934, R. S. 1881), it is provided, that the punishment for petit larceny shall be imprisonment in the State prison, with fine and disfranchisement; or that it may be imprisonment in the county jail for not more than one year, a fine not exceeding \$500.00, and disfranchisement for any determinate period.

By section 1642, R. S. 1894 (section 1573, R. S. 1881), all crimes punishable with death or imprisonment in the State prison are defined to be felonies; while other offenses against the criminal law are denominated misdemeanors. Under this section of the statute petit larceny is held to be a felony. *Short v. State*, 63 Ind. 376.

It has frequently been decided that, under the foregoing statutes, justices of the peace have no power to try a party charged with a felony, but can only examine and hold him to bail, or, in default of bail, commit him to jail to await trial in the proper court. *Harkins v. State, ex rel. Aud.*, 24 Ind. 288; *State v. Morgan*, 62 Ind. 35; *State v. Hattabough*, 66 Ind. 223; *Siebert v. State*, 95 Ind. 471.

The decisions in these cases, however, are expressly

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placed upon the ground as stated in *State v. Odell*, 8 Blackf. 396, that "The only judicial powers possessed by justices of the peace in this State, are those conferred by the statute concerning their powers and duties, and it is necessary that they should confine themselves strictly to the exercise of such powers as are therein granted."

As the punishment for petit larceny may be confinement in the county jail, with fine and disfranchisement, it is not clear, if the statute authorized justices of the peace to make such imprisonment and disfranchisement a part of their sentence, why they would not have jurisdiction to try a person charged with that crime.

Section 3497, R. S. 1894 (section 3062, R. S. 1881), as we have seen, does confer upon mayors of cities, in addition to the jurisdiction of justices of the peace, "the power to imprison, as a part of the punishment, for offenses against the law." This power they exercise as officers administering the laws of the State. The statute giving to mayors this power to imprison as a part of the sentence for a violation of law has been held constitutional. *Waldo v. Wallace*, 12 Ind. 569; Schroeder's McDonald's Treatise, Chap. 69, section 1.

In the statute before us the legislature has likewise given to the police court power to assess as punishment for a violation of the law, in addition to a fine, also imprisonment in the county jail or workhouse for a time not exceeding six months; and this power is made to apply in particular to the offense of petit larceny. But, with the statute held constitutional which gives to mayors the power to imprison, we are unable to see that the police judges, who simply take the place of mayors in city courts, may not also have given to them like power to imprison as a part of their

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sentence for a violation of the laws of the State. The good government of a large city requires that petty crimes should be punished without unnecessary delay. Such authority on the part of the police judge seems particularly fitting when it is considered that the punishment inflicted is less than that otherwise provided for in the ordinary administration of the law, the punishment being rather preventive in its character, and saving the culprit from the ignominy and debasing associations of confinement in the State's prison.

Neither do we think the circumstance, that because the statute fixes, as one punishment for petit larceny, imprisonment in the county jail, fine, and disfranchisement, while the police court is authorized to impose a fine and imprisonment only, militates against the jurisdiction of such court. It is provided that if the police judge shall be of opinion that the punishment which he is authorized to inflict is not adequate he may so find and recognize the prisoner to a higher court. Similar power is given to a justice of the peace. That magistrate has jurisdiction to impose a fine not to exceed \$25.00. The punishment fixed for assault is a fine not to exceed \$50.00; and for assault and battery a fine not to exceed \$1,000.00. Yet it has never been contended that, in case a justice of the peace finds a person guilty of assault, or assault and battery, and adjudges his punishment for either offense in a fine less than \$25.00, the jurisdiction of the justice is thereby defeated or called in question. The crime of petit larceny, like that of assault; or assault and battery, while retaining the same name, may yet be of various degrees of guilt, and so deserving of different grades of punishment. The fact that one court may be authorized to impose a greater, and another a less punishment, does not show that either court is without jurisdiction; but rather that one

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court has jurisdiction of one grade of the offense and the other of a different grade. The police court is especially set up to try petty violations of the law; and it is but right and proper that the legislature should have conferred upon this court, as it has upon that of the justice of the peace, jurisdiction to impose only the lesser degrees of punishment, in accordance with the character of the offense that will generally be brought before that court. Should the judge be of opinion that the degree of guilt is such that a greater punishment should be imposed than he is authorized to adjudge, then the statute points out the means of securing this more adequate punishment by sending the culprit to a court of higher jurisdiction. We are unable to see why this should deprive the inferior court of its own lesser jurisdiction; its own power to try the lower degree of crime, and affix the milder form of punishment.

It is also thought by counsel that the act must be invalid, if for no other reason, because by it the judge is given the right to say whether the penalty which he is authorized to impose is adequate to the offense committed; thus, as contended, depriving the accused of the right to a trial by jury, as guaranteed by Art. 1, section 13, of the constitution. This power to pronounce upon the adequacy of the sentence which he is authorized to adjudge is, however, as we have seen, also entrusted to the justice of the peace. But in neither case is the defendant deprived of his constitutional right to a trial by jury. The jurisdiction of the court is changed, but whether the accused be tried in a justice court, a police court, a criminal court, or a circuit court, the right to a jury trial remains inviolate.

The legislature, in creating a court, or in regulating the procedure of a court, rightfully, and even neces-

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sarily, entrusts many matters of detail to the sound discretion of the judge. To determine the question of its own jurisdiction is a necessary function of every court to be exercised before it assumes to try any case; and that the legislature should, in this act, have provided that the judge should try the case brought before him, unless, in his opinion, the punishment which he is authorized to assess should be inadequate to the offense, is not, in any manner, unusual or improper.

Indeed, the creation of this police court is but an exercise by the legislature of power long recognized as valid in the organization of inferior courts. In *Clem v. State*, 33 Ind. 418, in considering the validity of the act for the establishment of the Marion Criminal Court, it was held that for the creation of courts inferior to the circuit court, the legislature has power to pass laws local to one or more counties whose circumstances may so require, where such laws, if of uniform operation throughout the State, would be elsewhere mischievous, useless, or burdensome. And in other cases it has been frequently decided that the constitution does not prohibit special acts creating courts of inferior jurisdiction. *Combs v. State*, 26 Ind. 98; *Anderson v. State*, 28 Ind. 22; *Eitel v. State*, 33 Ind. 201; *Wiles v. State*, 33 Ind. 206; *Vickery v. Chase*, 50 Ind. 461; *Mode v. Beasley*, 143 Ind. 306.

In our opinion, the provisions of the Indianapolis city charter for the creation of a police court are in all respects valid; and the judgment of that court, here assailed, was rightfully upheld in the superior court.

Judgment affirmed.

Antioch College, etc., v. Branson *et ux.*

ANTIOCH COLLEGE, ETC., v. BRANSON ET UX.

[No. 17,800. Filed June 11, 1896.]

WILLS.—Construction.—Contingent Devise.—Where a testator gives all his “effects” in terms denoting an intention that the beneficiary shall have an absolute estate therein, a provision that if such testator die without issue the estate shall be divided as therein directed, will be construed to state a contingency to happen during the testator’s life.

From the Benton Circuit Court. *Affirmed.*

Allen & Chamberlin, and J. D. Brown, for appellant.

Claybaugh & Claybaugh, for appellees.

HACKNEY, J.—This was an action by the appellees, Curtis Branson and Jennie Branson, his wife, and a cross-action by the appellant, Antioch College, of Yellow Springs, Ohio, to quiet the title to certain lands in Benton County. The questions presented in this court arise upon the action of the lower court in sustaining a demurrer to appellant’s cross-complaint and in stating conclusions of law in favor of the appellee upon facts specially found. These questions involve the construction of the last will of Joseph A. Miles, which is as follows:

“Boswell grant Township Benton County and State of Indiana know all men by these presents that I Joseph Miles, doth bequeth to Curtice Branson and Jennie his wife all my effects at My death with the proviso, hereafter mention that the said Curtice Branson shal see that My 2 children that lies Beriud near Rosvil Ill shal Be removd to our lot at Boswell Cimetary and furthermore their shal bee a Scotch grannet monument Not less than two hundred and fifty dollars Put upon the lot provided It aint don before my deth

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the said Curtice Branson shal pay to Cora Branson One Thousand Dollars if the said Cora marries, I further say that if Jennie outlives Curtice Branson and he dy without ishue she Jennie shall have one Thousand dollars. I further say that if Cory Marries and the said Curtice Branson dies without issue, Jennie and Cora shal have \$1,000 each, and the Balance of my estate shal go to the antioch Colledg at Yellow Springs green Co Ohio if there is any left after my funeral expenses debtes are paid. April 1, 1891."

"J. MILES."

"J. S. BRADLEY, Executor of will.

JOHN W. FREEMAN, Witness.

JAMES S. BRADLEY, Witness."

The facts specially found disclose that the testator was a widower without a living child; that Curtice Branson and Cora Branson, named in the will, were the children of his cousin; that his personal property was of the value of \$2,600.00, and that his indebtedness was \$2,600.00.

The principal question between the parties is as to whether Antioch College was the devisee, primarily, of the real estate of the testator, consisting of one hundred and twenty acres.

Counsel for either side contend for the intention of the testator as disclosed in the language of the testament, and the argument turns chiefly upon the scope of the word "effects" as descriptive of the bounty bestowed upon the appellees. For the appellant it is urged that the word ordinarily applies to personal, and not to real property, and that the word "bequeath," a term properly applied to the disposition of personal property, supports the intention to bestow upon the appellees only the personalty of the testator. We apprehend, however, that the more important inquiry is as to

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what provision is made, by the testament for the appellant. It is clearly but a conditional provision, and is made to depend upon the marriage of Cora and the death, without issue, of Curtice Branson. If the contingency stated had happened the estate provided for the college would have been the balance remaining after paying \$1,000.00 each to Jennie and Cora.

The testator's reference to the death of Curtice Branson must be construed to state a time or a contingency to happen during the testator's life. *Fowler v. Duhme*, 143 Ind. 248.

The contingency upon which the appellant would share in the estate of the testator can, therefore, never arise.

Other questions discussed by counsel, involving the conditions upon which the appellees' devise or bequest was made to depend, are of no interest to the appellant, and therefore require no decision by the court.

The conclusion that the appellant acquired no interest in the property in question precludes the appellant from asserting possible error in construction favorable to the appellees.

The judgment of the circuit court is affirmed.

JENNEY ELECTRIC CO. v. BRANHAM.

[No. 17,193. Filed Sept. 24, 1895. Rehearing denied June 11, 1896.]

APPEAL AND ERROR.—*Evidence*.—The admission of evidence, which was not objectionable for the reasons urged against it, will not be ground for reversal, even though the reasons urged for its admission may be erroneous.

PLEADING.—*Common Count*. — *Recovery*. — *Evidence*. — *Contract*. — Plaintiff may plead the common count and recover, notwithstanding the evidence discloses a special contract.

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EVIDENCE—Admissibility of in an Action for Quantum Meruit.—In an action on the *quantum meruit* in a suit for value of services in effecting a sale of electrical machinery it was not error to permit the plaintiff to testify that defendant's president stated to him that the company paid from ten to fifteen per cent. commission for that kind of work.

SAME.—Expert Witness.—Qualification Of.—Practice.—Discretion of Court.—The question as to the qualification of a witness to testify as an expert is for the trial court, in the exercise of a sound discretion, and that when there is some evidence of such qualification and the trial court has not abused that discretion, this court will not review the action.

SAME.—Opinion Evidence.—Expert Testimony.—Non-experts, who are shown to be familiar with the extent and character of the particular services rendered, may properly give their opinion of the value of that service.

INSTRUCTION TO JURY.—Agent's Commission.—In an action on the *quantum meruit* for commission in the sale of goods an instruction that if the jury should find from a preponderance of the evidence in favor of the plaintiff they should assess such reasonable compensation as they should determine from a preponderance of the evidence he should receive for the services performed, is not erroneous where the evidence showed that the sale was made to another and different party than as alleged in the complaint.

SAME.—Credibility of Witnesses.—It is not error to instruct a jury that in determining the credibility of witnesses the jurors may take into account their experience and relations among men.

From the Marion Superior Court. *Affirmed.*

Miller, Winter & Elam, for appellant.

Hawkins & Smith, for appellee.

HACKNEY, J.—The appellee sued the appellant for the reasonable value of services, rendered by agreement, in effecting a sale of electrical machinery. Upon the trial the appellee, as a witness in his own behalf, was permitted, over the appellant's objection, to testify that the appellant's president had stated to him that the company "paid from ten to fifteen per cent. for that kind of work." There was, upon the entire evidence of the appellee, a conflict as to whether the alleged statement was a part of the conversation constituting the employment, or in a sub-

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sequent conversation. However, the appellee now insists, and the cross-examination confirms his view, that the alleged statement was a part of the conversation constituting the employment. A further part of the conversation, as testified by the appellee, is as follows:

"I said to Mr. Rorison, I have a party who is going into the electric light business, it is a pretty big thing, and I want to know whether your people would take hold of a thing of that kind. I gave him some idea of what the plant would be, and I told him that I knew the people were able to handle it if they would go into it. He said, 'Yes, they were in for anything.' Now I said, Mr. Rorison, if this thing is a success I want the usual commission, that is what I am after.' He said, 'All right.' I went on and told him where the plant was," etc.

Thus it will be seen that the evidence tended to support a contract, not only for the performance of the service and the payment of "the usual commission," but also specifying the rate of that commission as at "from ten to fifteen per cent."

The appellant insists that the action, being for the *quantum meruit*, permitted no evidence of a contract as to the value of the services rendered.

The appellee's contention is that the evidence was admissible to prove the knowledge of the witness as to the rate of commission paid for such services, and as qualifying him to testify as to the value of such services. If the evidence was not objectionable for the reason urged against it, we are not at liberty to hold its admission to have been erroneous, though the reason for its admission, given by the appellee, may be incorrect.

While the rule that one may plead the common count and recover, notwithstanding the evidence dis-

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closed a special contract, would, upon first impression, seem to be at variance with the ordinary rules of pleading and practice, yet it has been repeatedly held that under our code such recovery may be had. *Scott v. Congdon*, 106 Ind. 268; *Shilling v. Templeton*, 66 Ind. 585; *Brown v. Perry*, 14 Ind. 32; *Kerstetter v. Raymond*, 10 Ind. 199.

In *Scott v. Congdon*, *supra*, it was held that evidence of an agreement that for the work done the plaintiff should receive a sum stated, was "clearly competent, as tending to show the value of the work and labor done." Upon the theory of that holding it was certainly proper to admit the appellant's statements, of the commissions usually paid by it, as evidence of the value of the appellee's services for which, as he testified, he was to receive the "usual commission." However, we think that the question of the admissibility of the evidence as a part of the contract is not presented. At the time the court passed upon the objection of the appellant the witness had testified that the conversation with reference to the usual commission paid by the company was subsequent to the conversation in which the employment was made. It was upon cross-examination that the witness stated the time as that of the making of the employment. No motion to strike out the evidence so objected to followed, and the court was not asked to pass upon the question in the light in which the cross-examination placed it. In our opinion, the evidence was not objectionable for the reasons pointed out to the trial court and repeated in this court.

It is further complained that, while the appellee was a witness in his own behalf, he was permitted, over the objection and exception of the appellant, to testify as to his opinion of the value of his services in the matter of said sale. It was claimed by appellant's

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learned counsel, in the trial court, as it is in this court, that the services for which recovery was sought were of a professional character, and so far involved special training and skill, that their value should be proven only by witnesses who might be shown to possess such training and skill as to enable them to testify as experts, or to have possessed particular acquaintance with the usage of those engaged in performing or employing that special line of services, as to the commissions paid and received. It was not shown that the appellee had an acquaintance with that usage; but he had testified as to all that he did in connection with said sale, and as to the conclusion of the negotiations in which he participated. It is conceded by counsel for appellee that the value of such service necessarily called for opinion evidence, but it is denied that such opinions should, necessarily, have been those of experts, or those familiar with the custom or usage in the matter of commissions in that special line of service. While we have no doubt that the value of such service was the subject of proof by expert testimony, yet we are equally well satisfied that non-experts, who are shown to be familiar with the extent and character of the particular service, may properly give their opinion of the value of that service. *Louisville, etc., R. W. Co. v. Berkey, Admr.*, 136 Ind. 181; *The City of Lafayette v. Nagle*, 113 Ind. 425; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138; *Bennett v. Meehan*, 83 Ind. 566; *Smith et al. v. Indianapolis, etc., R. R. Co.* 80 Ind. 233; *Colee v. The State*, 75 Ind. 511; *Holten v. Board, etc.*, 55 Ind. 194; *City of Indianapolis v. Huffer*, 30 Ind. 235; *Doe v. Reagan*, 5 Blackf. 217. See also 33 L. R. A. 395.

These cases do not include the long line of decisions in this State, holding that where mental capacity is in issue and, though involving a question of the high-

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est order of skill and learning, that non-experts, who have shown an acquaintance with the person under inquest, may give their opinions as to capacity. As illustrated in many of the cases the value of an opinion, whether expert or non-expert, must depend upon the extent of knowledge and the degree of skill of the witness, but the question of the value of the opinion is not one of law for the court, but is one of fact for the jury in giving weight to the evidence.

In *City of Indianapolis v. Huffer, supra*, it was said: "The action of the court below in allowing witnesses, not experts, to give their opinion as to the capacity of the sewer is questioned. The rule is that any witness, not an expert, who knows the facts personally, may give an opinion in a matter requiring skill, stating also the facts upon which he bases that opinion." The rule so stated has been quoted with approval in most of the great variety of cases we have cited.

In *Bennett v. Meehan, supra*, it was said that "It has long been the rule in this State, that a witness who is familiar with the facts, and who states them to the jury, may express an opinion, although he is not an expert, if the case is one in which it is proper to express an opinion." Though never having engaged in a like service, the appellee was shown to be a man of extended business experience; that he was employed for this special service by the appellant, and performed the service for which he was so employed.

Another witness, called in behalf of the appellee, testified that for two years he had engaged in selling electric lighting apparatus for the establishment of electric lighting plants in cities and towns, and that he was acquainted with the value of services such as the appellee had performed. Several of the questions eliciting such testimony were answered over the objection and exception of the appellant, and, following

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such testimony, the witness testified, without objection or exception, in answer to a question by appellee's counsel, that the value of such service was ten per cent. It is now insisted for the appellant "that his examination fell far short of showing that he was competent to express an opinion as to the value of plaintiff's services." No objections are here urged to the rulings upon the preliminary questions eliciting the testimony of the qualifications of the witness to testify as an expert to the value of appellee's services. It will be seen, therefore, that no question, as to the evidence of this witness, is before the court. However, it may be said that it is now settled in this State that the question as to the qualification of a witness to testify as an expert is for the trial court, in the exercise of a sound discretion, and that when there is some evidence of that qualification, and the trial court has not abused that discretion, this court will not review the action. *Davis v. State*, 35 Ind. 496; *Forgey et al. v. First Nat. Bank, etc.*, 66 Ind. 123; *City of Ft. Wayne v. Coombs*, 107 Ind. 75.

The third of the court's charges to the jury was that if they should find from a preponderance of the evidence in favor of the plaintiff they should assess such reasonable compensation as they should determine, from a preponderance of the evidence, he should receive for the services performed. It is complained that the charge was not applicable to the evidence, that the complaint alleged a sale to Sutter, and the evidence showed a sale to another. The charge does not assume that the contingency claimed did not exist, but it directed the assessment of damages in the event of a finding for the plaintiff. The fourth charge was as follows: "If you find, from a fair preponderance of the evidence, that the defendant, Brainard Rorison, was agent of the defendant, the Jenny Elec-

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tric Company, and within the line and scope of his agency and employment he made a contract of employment with the plaintiff to introduce the parties to the Jenney Electric Company, to the end that they might sell to said parties, described in the plaintiff's complaint, certain machinery and appliances for an electric light plant, and, in pursuance of said employment, he did introduce said parties to the said Jenney Electric Company, and, as a result of the plaintiff's service, in pursuance of said contract, the Jenney Electric Company sold said electric plant, as described in the complaint, then your finding should be for the plaintiff; but, if you find, from a fair preponderance of the evidence, that such contract was made between the defendant, Brainard Rorison, and the plaintiff, if said Rorison was not the authorized agent of said company, and was not, at said time, acting within the line and scope of his authority as such agent, the Jenney Electric Company would not be bound by any contract made by him in the premises, unless the same was confirmed and accepted afterwards, when knowledge of said contract came to them, or, without formal acceptance, of the same, when full knowledge of the same came to them, they acted upon it and accepted it, and accepted the benefits under it." The objection urged against this instruction is that it was not responsive to any issue raised by the pleadings or the evidence. Though this objection may be true, it is manifest that the substantial rights of the appellant were not impaired by the charge, since its only effect would be to require that the plaintiff should discharge a burden not resting upon him and in no way essential to his recovery. No phase of the charge required more from the defense to defeat the plaintiff's cause of action or to diminish the amount of recovery, and

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certainly it was not calculated to prejudice the jury against the appellant or its defense.

The fifth charge was as follows: "You are the exclusive judges of the credibility of the witnesses, and it is your duty to reconcile any conflict that may appear in the evidence, as far as may be in your power, upon the theory that each witness has sworn to the truth; when this cannot be done, you may consider the conduct of the witness upon the stand; the nature of the evidence given by them; how far they are corroborated or contradicted by other testimony; their interest, if any, in the cause; their relation to the parties; and such other facts appearing in the evidence as will, in your judgment, aid you in determining whom you will believe, *and you may also, in considering whom you will or will not believe, take into account your experience and relations among men.*"

The objection to this charge is confined to the last direction thereof, that which we have italicized. By this, it is claimed the jurors were advised that it was proper for them to employ any of their particular experiences and relations among men out of court, in determining the rights of the parties. It is argued that such a rule would permit the disposition of a cause upon the whims of jurors, rather than upon the law and the evidence as they were learned in the trial.

Jurors should be, and as a rule are, selected because of their extensive experiences among men. The school of experience which men attend, in their varied relations among men, imparts a keenness of mental vision which enables them the more readily to see the motives and to judge of the selfish or unselfish interests of men. This education, be it much or little, is a part of the juror, and should not, if possible, be laid aside in passing upon the inducements, which

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may surround a witness, to speak falsely. It is this education which, to a great extent, enables a juror to discover in the faltering manner or the downcast eye whether the statement of the witness is made in modesty or in the guilt of falsehood. The value of experience is not to be given up when the man becomes a juror and is required to apply the tests of credit to the heart and mind of the witness; but whatever qualification that experience gives should be employed to the end that the whole truth may be known and acted upon. *State v. Gaymon*, 31 L. R. A. 489, and note. While, as we understand the charge, it did not tell the jurors that they should employ it, they were told that it was proper to employ it. Not, as counsel for appellant contend, as allowing a juror to bring forward some special experience or some special business transaction within his observation, bearing some similarity to the question on trial, and which had miscarried, and to conclude therefore that some phase of the present case should miscarry. The instruction was confined to the tests of credit, and the weight of the evidence of the witnesses and the clause in question was to be construed with reference alone to its bearing upon those tests. The case of *Densmore v. State*, 67 Ind. 306, is not in conflict with this charge. There the court, after suggesting the tests known to the law, said "that what is commonly called common sense is, perhaps, the jurors' best guide in these particulars." Judge Worden said: "Now, while common sense is a very desirable and admirable quality in man, and exceedingly useful in all of the practical affairs of life, including the duties of jurors, we do not see how it can be a better guide to them in the discharge of those duties than the rules of law." It will be seen that the instruction was regarded as directing the employment of common sense, not only

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as a better guide than the rules of law, but as a substitute for such rules.

In our opinion there was no error in the charge.

Finally, it is insisted that the verdict was not sustained by the evidence. There was evidence which, if uncontradicted, would have supported the verdict. The weight and effect of the contradictions and the evidence upon conflicting theories of the case were questions for the jury, and are not subject to review.

The judgment is affirmed.

HUMBARGER v. CAREY.

[No. 17,518. Filed January 22, 1896. Rehearing denied June 12, 1896.]

APPEAL.—*Record.*—*Bill of Exceptions.*—*Authentication.*—A bill of exceptions is not properly authenticated where a record entry preceding it states that it was signed by the judge on the 12th day of January, one immediately following it states that on such day the bill was presented to the judge for his examination with a prayer that it be signed by him, and a third entry shows that the longhand manuscript was incorporated and the bill signed by the judge nine days later, while the clerk's certificate shows that the manuscript was filed on the 12th day of January, but does not state when the bill was filed.

PRACTICE.—*Depositions Taken During Progress of the Trial.*—*Statute Construed.*—Under sections 426 and 427, Burns' R. S. 1894 (sections 422 and 423, R. S. 1881), the court may during the progress of the trial upon proper affidavits permit a party to take and use on such trial, the deposition of an attorney at law who resides in another state and is in ill-health and unable to attend court.

MISCONDUCT OF COUNSEL.—*Comments on Instructions to Jury.*—*When Not Reversible Error.*—Disparaging references made by plaintiff's attorney to instructions prepared by defendant, and given by the court, will not amount to reversible error where such references did not amount to comments upon the law of the instructions.

From the DeKalb Circuit Court. *Affirmed.*

C. A. O. McClellan, and D. A. Garwood, for appellant.

F. S. Roby, and Baxter & Brown, for appellee.

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HOWARD, J.—This was a proceeding brought by a statement made by the appellee, under provisions of section 2715, Burns' R. S. 1894 (section 2545, R. S. 1881), to have the appellant, who is his grandfather, found to be a person of unsound mind and incapable of managing his own estate.

The cause was submitted to a jury, who, after hearing the evidence, the argument of counsel, and the instructions of the court, returned a verdict of unsoundness of mind against the appellant. From the judgment entered upon this verdict this appeal is prosecuted.

It is assigned as error that the court overruled appellant's motion for a new trial.

Counsel for appellee insist that the assignment of error presents no question for our consideration, for the reason that the bill of exceptions, as they say, is not properly authenticated.

There is a record entry, preceding what purports to be a bill of exceptions, to the effect that on the 12th day of January, 1895, the appellant filed his bill of exceptions, containing the longhand manuscript of the evidence. This entry closes with the words: "which bill of exceptions is duly signed by the judge, is filed, and is in these words, to-wit:"

But a record entry immediately following the bill recites that the appellant, "now on the 12th day of January, 1895, presents this, his bill of exceptions, to the Hon. W. L. Penfield, judge of the said court, for his examination, approval, and official signature, and prays the court that the same may be signed, sealed, and made a part of the record." This entry is followed by the signature of the judge.

There is a further record entry, showing that on the 12th day of January, 1895, and within the time allowed to prepare and file a bill of exceptions, the ap-

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pellant "presented to the judge of said court the said longhand manuscript, and prayed that the same be incorporated into and made a part of this, his bill of exceptions, and that the said bill be signed and made a part of the record in this cause, which is here now done, on this 21st day of January, 1895." This is also signed by the judge.

Finally follows the clerk's certificate, that "the above and foregoing transcript contains true and complete copies of all the papers and entries in said cause. I further certify that on the 12th day of January, 1895, the official reporter who took down the evidence, filed in my office his longhand manuscript thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions, and made a part of the foregoing transcript.

"In witness whereof, I hereunto set my hand, and affix the seal of said court, at Auburn, this 12th day of January, 1895. D. D. MOODY, Clerk."

The two record entries immediately preceding and following the bill are in conflict. That preceding the bill states that the bill was signed by the judge and filed on the 12th day of January. The entry immediately following the bill states that on January 12, the bill was presented to the judge for his examination, with a prayer that it might be signed by him and made a part of the record.

The third record entry, being the second following the bill, shows that the longhand manuscript was incorporated into the bill of exceptions, and the bill signed by the judge on the 21st day of January.

The clerk's certificate, finally, shows that the longhand manuscript was filed in his office on the 12th day of January; but does not state when the bill of exceptions was filed. This certificate of the clerk, which is the only one in the record, is dated January

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the 12th, nine days before the longhand manuscript was incorporated into the bill of exceptions, and before the bill itself was signed by the judge, as shown by the last record entry signed by the judge.

These entries and certificates, to say the least, leave the record in a state of confusion. The two entries signed by the judge are consistent. The first shows that the bill was presented to him on January 12, 1895, and the second shows that he signed the bill on January 21, 1895. This would seem also to show that the entry preceding the bill, and which states that the bill was signed by the judge and filed on January 12, is erroneous; and that the bill was simply presented to the judge on that day, but not signed until the 21st. The certificate of the clerk, which is dated January 12, was evidently premature, being made before the bill of exceptions was signed by the judge. It will hardly be said that the judge could incorporate the longhand manuscript into the bill of exceptions, and sign and file the latter after the record had been made up and certified to this court by the clerk.

It is apparent that the bill of exceptions is not properly authenticated. No question is, therefore, presented for our consideration on the assignment of error.

The judgment is affirmed.

ON PETITION FOR REHEARING.

HOWARD, J.—Counsel for appellant complain that the bill of exceptions in this case has been excluded by an observance of mere technicalities. We have, however, simply applied the provisions of the statute to the case. A consideration of the dates of the several entries and certificates relating to the bill, in connection with the requirements of the statute en-

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acted on the subject, will make it clear that the holding of the court is not merely technical, but in strict accordance with the requirements of the law. It is certainly but reasonable that those who bring appeals to this court should comply with the provisions of the law and the rules of the court in relation thereto. An orderly administration of justice could be satisfied with nothing less.

Complaint is also made that we did not decide two questions, not dependent for their solution upon the evidence; namely, whether the trial court erred "in ordering the plaintiff to take the deposition of Jack C. Ryan," and whether the court erred in permitting the attorney for the plaintiff, in his address to the jury, to make certain disparaging references as to instructions prepared by the defendant and given by the court.

The motion to take the deposition of Mr. Ryan was supported by affidavits going to show that he was an attorney at law, residing over the line in the State of Ohio, and that he was in ill health and unable to attend court. Counsel for appellant was asked by the court whether he would prefer to take the deposition that afternoon (Saturday), or on the following Monday. Counsel answered that "he did not expect to be present at the taking of the deposition; that it did not make any difference to him whether it was taken that afternoon or the Monday following; that he would not be there anyhow; that the court had no right to order the taking of the deposition, and that it would be void for the reason that the court had no power during the progress of the trial to order the taking of the deposition outside of the State, in a case of this kind."

The statute (section 426, R. S. 1894; section 422, R. S. 1881), provides that "in all actions the court may order the taking of depositions, whenever deemed

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necessary to determine the rights of the parties, or to expedite the trial of causes; and may, if necessary for that purpose, order a continuance until next term."

In the succeeding section it is provided that such deposition may be used "where the witness does not reside in the county, or in a county adjoining the one in which the trial is to be held, or is absent from the State;" or when he is "so aged, infirm, or sick, as not to be able to attend the court;" or when he is an "attorney at law, and the trial is to be had in any county in which the deponent does not reside."

There was ample reason, under the statute, for taking and using the deposition objected to. The record also shows that the appellant has no cause to complain that the deposition was not taken at a time when he could attend by counsel. The right to attend at the taking of the deposition was expressly waived in open court.

As to the remaining error complained of, the improper comments made by plaintiff upon defendant's instructions, it may be said that the comments made were improper and should have been reproved by the court on objection made by the defendant. *Board, etc., v. Arnett*, 116 Ind. 438; *Scott v. Scott*, 124 Ind. 66, 68. We are inclined to think, however, that no harm was done to defendant by the indiscreet words of counsel. The language used did not amount to comments upon the law of the instructions; for it was not said that they contained any erroneous statements of law. The statute (section 543, R. S. 1894; section 534, R. S. 1881), in civil cases, permits the reading to the jury of instructions which have been prepared by the court before argument, and of the discussion of the evidence in relation to such instructions. No comments, however, should be made upon the law as thus indicated to be given by the court. While, therefore, the lan-

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guage complained of, and the refusal of the court to disapprove of it, must be condemned as a reprehensible encroachment upon the exclusive right of the court, in civil cases, to declare the law to the jury, yet we are unable, in this case, to see that the finding of the jury could have been affected by the indiscreet and probably inadvertent conduct of counsel. The instructions given by the court fully and fairly advised the jury as to all questions affecting the rights of appellant, and as to whether he was a person of sound mind and capable of managing his own estate.

Petition overruled.

ROACH V. BAKER ET AL.

[No. 17,825. Filed May 25, 1896. Rehearing denied June 12, 1896.]

APPEAL.—*When Co-parties Must be Joined.*—In order to confer jurisdiction upon the Supreme Court, of an appeal by one of the two defendants against a judgment ordering a writ of assistance to issue against both, the other defendant must be joined as a co-appellant, unless it is a term time appeal under Act of 1895, p. 179.

SAME.—*Separate Causes Not Appealable In One Record.*—Separate causes by the same plaintiff against different defendants, involving the same questions, but between which there is no necessary connection, cannot be included in the same appeal when there has been no consolidation in the trial court; although by agreement the evidence taken in one cause was considered in the other, and the special findings of facts and conclusions of law in both cases embodied in one instrument.

From the Elkhart Circuit Court. *Dismissed.*

Osborne & Zook, for appellant.

A. Deahl, and *Baker & Miller*, for appellees.

MCCABE, J.—The administrator of one Hulda Roach obtained an order of the Elkhart Circuit Court, authorizing and requiring him to sell certain lands of

145	330
146	508
145	330
153	314
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154	394
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157	498
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162	308
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167	551

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which she died seized, situate in said Elkhart county. The order was made on a petition making parties thereto all the heirs of said Hulda, among whom were the appellant, her surviving husband, and one Elmer L. Roach. The land was ordered sold to discharge liens thereon and to make assets to pay debts generally. The appellee Baker, at said administrator's sale, became the purchaser of one parcel of the land and the appellee Clark another. They each received an administrator's deed, pursuant to the sale to each, under the approval of the court. Thereafter they each filed a separate petition against appellant and Elmer L. Roach, setting up all the facts already mentioned, and many others, and alleging that said appellant, Thomas W. Roach, and said Elmer L. Roach, were in possession of the premises and refused to surrender them, though they had been made parties defendant to the petition to sell aforesaid, concluding with a prayer for a writ of assistance in each case.

The issues formed upon each of said petitions were tried by the court without a jury, after an agreement to hear the evidence in the two cases at the same time, which was accordingly done, resulting in a special finding of the facts, on which the court stated conclusions of law leading to judgment against the defendants, ordering a writ of assistance to issue against both defendants to place them out of possession.

The defendant, Thomas W. Roach, alone has appealed, but he has not made his co-judgment defendant, Elmer L. Roach, a party to the appeal, either as appellant or appellee. He should have been made an appellant, in order to confer jurisdiction of the appeal on this court. *Wood v. Clites*, 140 Ind. 472, and cases there cited; *Rosenbower v. Schuetz*, 141 Ind. 44; *Hutts v. Martin*, 141 Ind. 701; *Gregory v. Smith*, 139

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Ind 48; *Bozeman v. Cale*, 139 Ind. 187; *Hutts v. Martin*, 131 Ind. 1.

The appeal is, therefore, dismissed for want of jurisdiction.

ON PETITION TO REINSTATE THE APPEAL.

MCCABE, J.—It is urged, in support of the motion to reinstate the appeal, that it was a term-time appeal, and hence, under the act approved March 9, 1895, it is contended that it is not necessary to make all co-parties to the judgment below parties to the appeal. Acts of 1895, p. 179. That is the effect of that act. We find, on a careful re-examination of the transcript, that the appeal in this case was a term-time appeal, and hence the failure to make one of the co-parties to the judgment below a party to the appeal is no cause for the dismissal of the same, under that act. We were led to suppose that it was a vacation appeal by the action of the appellants giving notices thereof which are attached to the transcript.

Such notices are wholly unnecessary in a term-time appeal. But we find an insurmountable objection to the reinstatement of the appeal and sufficient reason why this appeal cannot be prosecuted.

As is stated in the original opinion, there were two separate petitions filed below against the Roaches, praying for a separate writ of assistance in each case against them, one by appellee Baker and the other by the appellee Clark.

These petitions show that each petitioner was a separate purchaser of a separate and distinct piece of real estate from the administrator of Hulda Roach, deceased.

Separate answers and replies were filed in each case, and separate issues were made in each. The two

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cases thus made had no connection with or relation to each other, except that each piece of land was purchased of the administrator of the same estate by different purchasers, who became the different and separate plaintiffs below. The two cases were just as separate and distinct as if the purchases had been made of administrators of different estates.

There was no order of court or agreement of the parties consolidating the two cases.

The record states that: "By agreement of parties herein, the court now hears the evidence at the same time in both matters, that is in the petition for a writ of assistance on the part of said Clark, and also on the part of said Baker, against said Roach, and the evidence by one shall be considered in the action for the other."

At the commencement of the special finding of facts by the court, it is recited that: "The court having been requested by Thomas W. Roach to make a special finding of facts and state conclusions of law thereon, on the issues between him and John Clark, and also Francis E. Baker, in their respective applications for a writ of assistance, and upon the agreement of the parties made in open court that the finding of facts and conclusions of law thereon should be embodied in one instrument with the same effect as if found separately in each case, finds the facts as follows:" And then follows the facts in relation to both purchases and in support of the issues on both petitions.

But these two causes, with separate and distinct party plaintiffs, whose interests are separate and distinct from each other, the issues and the judgment in each of which are separate and distinct from the other, are attempted to be united in one appeal in one transcript, with two separate and distinct assign-

ments of error, such as would be appropriate had there been separate appeals and transcripts against each of the successful plaintiffs.

In short, the attempt is made to embrace two separate causes and appeals in one transcript and in one appeal, where there is no necessary connection between the causes or appeals, and where there has been no consolidation of the causes in the trial court.

It was held by this court that such a thing cannot be done in *Rich v. Starbuck*, 45 Ind. 310, and for that reason the appeal was dismissed. It was there said: "The transcript contains a complete record of two distinct and separate actions. * * * The statute allows appeals from judgments in the circuit and common pleas courts, but it does not contemplate that several judgments shall be included in one transcript, and brought to this court in one appeal, simply because they are between the same parties, and relate to the same subject-matter. * * We are not willing to sanction the practice of appealing two causes in one record, and thus uniting them in one appeal. The appeal is dismissed, with costs."

The appellant in the present case has no right to prosecute this appeal in its present form, and hence he has no right to have it reinstated.

The petition to reinstate is therefore overruled.

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175 334
181 25

[No. 17,650. Filed April 14, 1896. Rehearing denied June 16, 1896.]

VENDOR AND PURCHASER.—*Purchase-money.*—*Vendor's Lien.*—*Enforcement of by One Not a Grantor.*—*Contract.*—The holder of a contract for the purchase of real estate, capable of specific performance, who has it directly conveyed to a third person, may enforce a vendor's lien for unpaid purchase-money, due him from

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the grantee, although at the time of such conveyance nothing had been paid on the contract to the vendor.

VENDOR'S LIEN.—*Right of, Not Lost by Assignment of Note.*—The right to enforce a vendor's lien against the maker of a note is not waived and lost by the assignment of such note.

From the Marion Superior Court. *Affirmed.*

N. M. Taylor, for appellant.

I. L. Bloomer, for appellee.

HACKNEY, C. J.—On the 28th day of October, 1892, Charles E. Allender held the legal title to a house and lot in West Indianapolis, of which William J. Smith desired to become the purchaser, and sought the appellees, Mills & Small, with that object in view. On that day the following writing was executed between said Mills & Small and said Smith:

“INDIANAPOLIS, IND., Oct. 28, 1892.

“Mills & Small: I will give you for house No. 90 Division street, West Indianapolis, fifteen hundred dollars (\$1,500.00), and will pay for the same as follows: To assume mortgage on lot of \$260.00 to N. McCarty, and one mortgage to building and loan association of \$901.50, and give Billy Cook (horse) and carriage and harness, three promissory notes (my sale notes), due in nine months, amounting to \$60.59, and I will give my notes for \$153.00, payable at \$20.00 per month; first note due in thirty days, and \$20.00 every thirty days until the \$153.00 are paid; these notes to draw six per cent. interest from date. I to have possession on or before November 10, 1892.

“WM. J. SMITH.”

“We accept the above proposition.

“MILLS & SMALL.”

Thereafter the following writing was executed between Mills & Small and said Allender:

“INDIANAPOLIS, IND., Oct. 29, 1892.

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"Mills & Small: I will sell you my house and lot, house No. 90 Division street, West Indianapolis, lot being 547 in McCarty's 11th west side addition to the city of Indianapolis, on the following terms: You to pay mortgage to Aetna Savings and Loan Association of \$900.00, and one to McCarty of \$250.00 and int., and you give me two \$12.00 notes, due in nine months, on John Bradford and Anthony Hansing, endorsed by William J. Smith, and you give to me \$26.00 in cash. The notes and cash making me \$50.00 clear of all commissions. The cash and notes to be given me on Tuesday, 1st day of November, 1892.

CHARLES E. ALLENDER."

"We accept the above proposition.

"MILLS & SMALL."

After the execution of said two writings, and on the 29th day of October, 1892, William J. Smith executed his several notes for \$153.00 to Mills & Small, and otherwise executed his part of the proposition so made by him, and Mills & Small procured Allender and wife to execute to Hester A. Smith, wife of William J. Smith, a deed of general warranty for said lot. Said deed being so executed, by the oral agreement of William J. Smith and Mills & Small, and in and by said deed the grantee assumed, expressly, the payment of said two mortgages.

Subsequently, Mills & Small paid to Allender \$26.00 in money and made over to him the two notes of Bradford and Hansing, endorsed by Smith, for \$24.00. The notes of William J. Smith, for \$153.00 were assigned in blank to one Lipsey, who thereafter assigned them by endorsement to said Mills & Small, "without recourse" on such assignor.

Mills & Small instituted this suit upon said notes for \$153.00 against William J. Smith, and to enforce against said lot a vendor's lien as to Hester A. Smith.

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Upon the issues found below the court gave personal judgment against William J. Smith, and declared a vendor's lien as to the appellant, Hester A. Smith. The only questions here presented are by Hester A. Smith, and they relate to the right of Mills & Small to maintain such lien.

It is first insisted, by counsel for the appellants, that Mills & Small, having paid nothing to Allender, at the time of the conveyance to Mrs. Smith, were not equitable owners of the lot and could not claim a vendor's lien. It is expressly conceded that they held such an obligation of Allender that they could have enforced specific performance, but this, it is said, does not constitute an equitable title. The cases of *Johns v. Sewell*, 33 Ind. 1; *Dwenger v. Branigan*, 95 Ind. 221, and *Barrett v. Lewis*, 106 Ind. 120, are cited in support of this insistence. These cases hold, as we understand them, that one paying the purchase-money, upon a contract to convey to him or another, may maintain a lien as a vendor, but this is far from deciding that one holding a contract for a conveyance, upon terms to be performed after conveyance, must perform before conveyance to be enabled to sell his beneficial interest, the equitable title, and maintain a vendor's lien for the selling price. The effect of the writing between Allender and the appellees is conceded to be sufficient, upon its face, to create an equity in favor of the appellees, not only to enable them to have enforced a conveyance to them of the legal title, but also to constitute them the equitable vendors upon a conveyance by Allender to Mrs. Smith, by the mutual understanding of all the parties, if they had theretofore paid Allender the purchase-price.

Presuming, as we must, that the contract between Allender and the appellees was valid and, as the evi-

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dence discloses, its terms were complied with by the appellees, we can see no reason for holding that Mrs. Smith is not their equitable vendee. Part of the agreed consideration for Allender's promise to the appellees was their promise to assume certain mortgages and prepayment of the small difference was not more essential than that they should have tendered their assumption as a prerequisite to the execution of his deed to them. The deed to Mrs. Smith executed the contract between Allender and the appellees, and she cannot say that their equity should be defeated because they had not prepaid the purchase-money, no more than she could complain that she got no title because the contract between Allender and the appellees was in parol, if it had not been in writing.

A disputed point, upon the evidence, was as to whether the appellees, at the time of their contract with and the execution of the deed to Mrs. Smith, were acting as the agents of Allender to make the sale, or were acting for themselves. We cannot pass upon the conflict in the evidence, and, therefore, find it unnecessary that we should determine whether parol evidence upon that subject was a contradiction of the written contract between them, or whether the appellant may take advantage of the fact that appellees' hands may have been soiled by taking an unfair advantage of their relations to their employer, Allender.

Nor is it material that appellees failed to make proof of the allegation in their pleadings that the conveyance to Mrs. Smith was designed by her and her husband to defraud the appellees in the collection of the purchase-money. Their case, it is conceded, was as strong without as with such allegations, and, in our opinion, the same is true upon the evidence.

The remaining proposition of the appellant is, that

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if a lien had existed in favor of the appellees it was waived and lost by the assignment to them, by Mrs. Lipsey, without recourse upon her. Counsel concede that, in the absence of this restricted assignment the lien would have passed. In other words, that a general assignment of the evidence of debt carries with it the lien of the vendor. On the other side, it is conceded that any act indicating an intention, by the holder of such a note, that he does not rely upon the lien, is a waiver of the lien.

Briefly stated, does the holder of a note, who may enforce a vendor's lien, cut off the lien by assigning the note without recourse? Or, does the assignee, by accepting such limited assignment, waive the right to enforce such lien? Two cases cited by counsel for the appellant apparently sustain his proposition. *Smith v. Smith*, 9 Abb. Pr. (N. S.), 420, and *Schnebly v. Ragan*, 7 Gill & Johns. (Md.), 120, while *Neese v. Riley*, 77 Tex. 348, holds the other way.

In *Smith v. Smith*, *supra*, it was said: "When the vendor assigns the purchase-money debt, and continues to have a pecuniary interest in its payment, he does nothing manifesting an intention not to rely upon the lien. His interest to preserve it remains. But, when he assigns the debt in such manner and form as to have no further interest in its payment, and omits to assign the lien in terms, he manifests the intent that the lien is no longer to be relied upon; and that destroys it."

As to the Maryland case, we may say that the rule has been in that State that the assignment of the purchase-money note does not carry the vendor's lien to the assignee. *Dixon v. Dixon*, 1 Md. ch. 220; *Iglehart v. Armiger*, 1 Bland (Md.), 519; *Johns v. Sewell*, 33 Ind. 1 (p. 4). Whether this is the rule in that State at present, we do not inquire, but the fact that the rule

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so thoroughly established in this State, that the lien does so pass, has been accepted in that State, if at all, with reluctance detracts from the strength of the case cited. The case of *Smith v. Smith*, *supra*, was by the Buffalo Superior Court, and is in line with the rule that an assignment of the debt by the vendor does not carry the lien. That New York is one of the States denying the rule that an assignment of the debt carries the lien, is stated in 28 Am. and Eng. Ency. of Law, p. 107, note 1; and *White v. Williams*, 1 Paige, 501. That the Indiana cases are in harmony in holding that the lien passes with the debt as an incident, and without special assignment, as has always been the case with reference to mortgage liens, collateral guarantees, and pledges, see *Lagow v. Badollet*, 1 Blackf. 416; *Johns v. Sewall*, *supra*; *Nichols v. Glover*, 41 Ind. 24; *Felton v. Smith*, 84 Ind. 485; *Lowry v. Smith*, 97 Ind. 466; *Otis v. Gregory*, 111 Ind. 504; *Upland Land Co. v. Ginn*, 144 Ind. 434. By reference to these cases it will be seen that the lien of a vendor, in respect to its following the debt, has been treated exactly as the lien by a mortgage.

Concerning the rule that the lien should be looked upon with doubt and suspicion, this court has said: "We have no temptation * to hedge in the conceded right with limitations which greatly tend to impair its utility and value, and which, it seems to us, sets at nought some very plain rules which are uniformly applied in analogous cases. The incident generally follows the principal thing, and in all other cases that now occur to us the security is carried by the transfer of the debt." *Johns v. Sewall*, *supra*.

In the case of *Nichols v. Glover*, *supra*, it was held that, where the purchase-money notes were not made to the vendor, but were made directly to his creditor in satisfaction of his debt and, necessarily, leaving no

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pecuniary interest or obligation on the part of the vendor to keep alive the lien, the lien was not lost or waived, and that equity would protect and keep it alive for the benefit of the creditor.

In *Nutter v. Fouch*, 86 Ind. 451, it was held that the equitable lien of the vendor is not waived or lost by proceeding, through his legal remedy, for the collection of the debt.

In the present case, the vendors, Mills & Small, indicated no intention of relying upon other security, or in any other manner waiving their equitable lien by the endorsement made by them, nor can we observe any such intention manifested by the acceptance of the notes from Mrs. Lipsey. Did her limited endorsement cut off or affect the lien? It did not affect the debt, and if it affected the incident, the lien, it certainly could not have been in the form or the affect of the assignment. If the assignment had been by the mere endorsement of her signature, her liability would have been that of an endorser, she would have warranted the liability and ability of the maker to pay the notes. The effect of the endorsement made was simply to negative any liability as endorser. It transferred the note as effectively as an endorsement in blank, but it warranted nothing. True, it left no pecuniary interest in her to maintain the lien, but it did not give the appellees any security, nor did it impair the liability or standing of the appellant, and we certainly do not observe how the appellees, by accepting a return of notes, waived the lien which equity created, in the first instance, for their protection. The appellant appeals to equity with little grace in saying: "I have the property and have paid nothing for it; you hold the consideration notes, but I will not pay them, because you have no recourse to a personal claim

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against your endorser." Whatever the rule, in states where an assignment of the purchase-money notes does not carry the vendor's lien, we cannot sanction a rule so devoid of equity where, as in this State, the lien does pass with the debt, and where it is not looked upon with such disfavor as in some jurisdictions.

Finding no error in the record, the judgment is affirmed.

ON PETITION FOR REHEARING.

HACKNEY, J.—Counsel for appellant has presented an able argument in support of the petition for a rehearing, urging that we were in error in holding that Mrs. Smith occupied the relation of vendee to Mills & Small, when they had paid no part of the purchase-price to Allender, and when, as claimed for her, they held no equity in the property at the time it was conveyed by Allender to her. It was not our purpose, as supposed by counsel, to place our holding upon the ground that Mills & Small could have enforced specific performance, under their contract with Allender, without complying with the terms of the contract on their part. We understood counsel to concede that they could have enforced their contract, upon compliance with such terms and we employed that concession to demonstrate the existence, in the appellees, of an equity in the property. If, however, it were error to hold that Mills & Small, before the conveyance, held an equitable estate in the property, they not then having paid the agreed consideration to Allender, there is little room for the contention that, having paid the consideration and having stood in the relation of vendor to Smith, while Allender was but Smith's grantor, who looked alone to, and received from and through the appellees the only consideration

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paid to him, that appellees, by the entire transaction, were not the equitable vendors of Mrs. Smith.

There may be a clear distinction between a grantor and a vendor, and this transaction illustrates the distinction. As said in *Russell v. Watt, Admr.*, 41 Miss. 602, 93 Am. Dec. 270: "A *grantor* is one who gives, bestows, or concedes a thing, and in legal parlance is understood to be the party who makes and executes a deed or conveyance. A *vendor* is a seller; a person who disposes of a thing for money." A vendor's lien may be enforced by one who is not a grantor. *Russell v. Watt, supra*; *Holloway v. Ellis*, 25 Miss. 103; *Stewart v. Hutton*, 3 J. J. Marsh. (Ky.) 178; *Ligon v. Alexander*, 7 J. J. Marsh. (Ky.) 289; *Davis v. Pearson*, 44 Miss. 508; *Anderson v. Spencer*, 51 Miss. 869.

In *Russell v. Watt, supra*, Mrs. Russell claimed to be the owner by gift, but without a deed, for the land in question. She sold the land and procured a deed to be made to her vendee from the party holding the legal title. It was said in that case, that after receiving the conveyance and becoming indebted to the vendor for the purchase-price, "He is precluded from going behind it, nor can any person claiming under him inquire whether the original parol gift from Booth to Mrs. Russell could or would have been enforced as against the donor, had he refused performance. * * * It is immaterial, so far as the present controversy and parties are concerned, whether her title was a legal or an equitable one, as this was a question exclusively between the father and daughter, which was not made at a time when it could have been urged, and now that the gift from Booth has been carried out and perfected in good faith, and the contract from Russell and wife to Moore has been completely executed, it is impossible to raise the question—it would be useless folly to discuss it."

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Mills & Small were the vendors of Mrs. Smith; they paid the purchase-money to Allender; they took the obligation sued on as representing the purchase-money from Smith; the transaction was completed according to the terms of the two contracts; Allender conveyed to Mrs. Smith simply as a short method of passing to her the title he had sold to the appellees; the transaction was not between Smith and Allender. The deed having been executed for the appellees, pursuant to their contract of purchase, they having paid him the agreed price, and they having discharged their obligation to Smith, it matters very little what would have been the result of actions for specific performance if Allender had failed to convey. Mrs. Smith obtained the title purchased by the appellees, and it has never been paid for. Good conscience demands a lien for the purchase-money.

We are confirmed in the view originally taken. The petition is overruled.

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[No. 17,786. Filed June 16, 1896.]

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169 278APPEAL.—*All Parties to Judgment Must be Made Parties to Appeal.*—

All parties to a judgment must be made parties in the assignment of errors on an appeal therefrom, or the appeal will be dismissed.

From the Monroe Circuit Court. *Dismissed.*

W. A. Pickens, for appellant.

W. Hickam, for appellees.

HOWARD, J.—The appellant brought this action for damages against the appellees, William M. Franklin, Adoniram J. Curtis, James F. Lawson, Willis Hickam,

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John N. Hurty, and James W. Archer; also Jacob Coble, not made a party to the appeal. The action was upon a contract, alleged to have been entered into between the parties, according to which the said defendants, who were engaged in forming a sanitarium company for the purpose of utilizing an artesian well at Spencer, in Owen county, agreed that if the appellant should take \$5,000.00 of the capital stock of the company the board of directors would appoint him superintendent of the sanitarium at a salary of \$100.00 per month for five years. The company was duly formed; but it is alleged that the defendants failed and refused to carry out the contract with appellant, although he was at all times ready to perform his part therein. The company afterwards became insolvent. The demand is for \$12,000.00.

The defendants, excepting James W. Archer, but including the said Jacob Coble, filed an answer in five paragraphs; and also filed a cross-complaint, in which a detailed history is set out of matters relating to the artesian well and the sanitarium company. In this cross-complaint, the corporation formed by the parties, called the Spencer Mineral Springs and Sanitarium Company, is brought in as a defendant, and the court is asked to have the contract in suit reformed so as to show that the agreement entered into was solely between the appellant and the sanitarium company, and not between appellant and the defendants to the complaint.

The company appeared and answered to the cross-complaint. The appellant also filed his answer to the cross-complaint.

The court made a special finding of the facts, finding them substantially as set out in the cross-complaint; and also found conclusions of law in favor of appellees.

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The judgment and decree entered upon the findings and conclusions of law is as follows:

"It is now ordered, adjudged, and decreed by the court that the plaintiff take nothing by his action herein. It is further ordered by the court that the within instrument, mentioned in the complaint and cross-complaint herein, be reformed to make it the contract of the Spencer Mineral Springs and Sanitarium Company with the plaintiff, and not the contract of William M. Franklin, Adoniram J. Curtis, James F. Lawson, Willis Hickam, John N. Hurty, Jacob Coble, or either of them; and that as to said parties and each of them, the same be cancelled and declared null and void. It is further ordered that the said answering defendants recover of the plaintiff their costs and charges herein laid out and expended."

Numerous errors are assigned by appellant for our consideration; but we are first met by the motion of appellees to dismiss the appeal for failure of appellant to make all the parties to the judgment, parties to this appeal.

It will be noticed that the judgment of the court was in favor of the cross-complainants, naming Jacob Coble as one of them. The judgment was also against the appellant and against the Spencer Mineral Springs and Sanitarium Company, reforming the contract sued on as against that company. Neither the sanitarium company, however, nor Jacob Coble is made a party to the appeal in the assignment of errors.

It is said, by counsel for appellant, that the whole record shows that Jacob Coble has no interest in the judgment, and therefore that he is not a proper party. An examination of the record does not enable us to come to this conclusion; but even if it did, we do not

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think that would justify us in overlooking the omission of his name as a party to the judgment, a party, too, who is actually named by the court in its decree. The statute, and the rules of this court, require that all those that are parties to the judgment must be made parties to the appeal, and given notice of such appeal that they may protect any rights they may have in the judgment or against it. Counsel do not give any reason for omitting the sanitarium company from the assignment of errors. Yet, if this appeal should prevail, we should have the anomaly of a judgment reversed as to all the defendants except Jacob Coble, and yet the same judgment standing as to said Coble and the sanitarium company. The law provides for one appeal, and that all the parties shall have the right to participate in it if any do. The appeal cannot be so split up.

In *Gourley v. Embree*, 137 Ind. 82, it was said: An appellant "cannot have a lawsuit by himself, nor can he select from the parties to the final judgment such as he chooses to name, and omit the others. He must name all who are affected by the judgment appealed from. If he has not done so, the assignment of error will be held unavailing whenever the defect is brought to the notice of the court. Elliott's App. Proced., section 401; *Braden v. Leibenguth*, 126 Ind. 336." See also *Holloran v. Midland, etc., R. W. Co.*, 129 Ind. 274; *Brown v. Trexler*, 132 Ind. 106; *Gregory v. Smith*, 139 Ind. 48; *Lilly v. Somerville*, 142 Ind. 298, and numerous authorities cited in those cases.

The appeal is dismissed.

Carson v. State, *ex rel.* Bath.

CARSON v. STATE EX REL. BATH.

[No. 17,985. Filed June 16, 1896.]

OFFICERS.—*Vacancy in Office of City Treasurer.—Tenure of Appointee.—City Council.—Statutes Construed.*—Where, under section 3483, Burns' R. S. 1894 (section 3050, R. S. 1881), a person is elected by a city council to fill a vacancy in the office of city treasurer, caused by the death of the regularly elected incumbent, he is, under section 7583, Burns' R. S. 1894 (section 5567, R. S. 1881), entitled to the office for the entire unexpired term for which his predecessor was elected.

From the Tipton Circuit Court. *Reversed.*

T. M. Butler, S. B. Nash, Swoveland & Pyke, and Waugh, Kemp & Waugh, for appellant.

Fippen & Purois, Gifford & Gifford, Oglebay & Oglebay, and M. T. Sheil, for appellee.

MONKS, C. J.—The relator, Bath, filed an information, in the court below, to oust appellant from the office of treasurer of the city of Tipton, claiming that he was entitled thereto.

Appellant's demurrer to the information for want of facts was overruled, and upon his refusal to plead further, judgment of ouster was rendered against him. The action of the court in overruling the demurrer to the information, is assigned as error.

It is alleged, in each paragraph of the information, that at the election of 1894 in the city of Tipton, one Thatcher was elected treasurer of the city of Tipton for the term of four years, from the first Monday in September, 1894, and that he entered upon the discharge of the duties of his office on said day, and continued to hold said office under said election until January 31, 1895, when he died, and thereby said office became vacant; that afterwards, on April 8, 1895, the common council of said city elected appellant

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treasurer of said city to fill the vacancy caused by the death of said Thatcher, and appellant filed his bond and was duly qualified, and entered upon the discharge of the duties of said office of treasurer, and now holds the same; that, at the May election of 1896, the relator received a majority of the votes cast at said election for the office of treasurer of said city, and received a certificate of his election and gave his bond and qualified as such treasurer, in pursuance of his election, and demanded the possession of said office of appellant, which was refused.

The question presented is, whether appellant was entitled, under his election by the common council to hold the office of city treasurer for the unexpired term of Thatcher, which would end the first Monday in September, 1898, or only until the next city election in May, 1896.

Appellant was elected by the common council to fill the said vacancy, under section 16 of the Act of 1869, concerning the incorporation of cities, being section 3483, R. S. 1894 (section 3050, R. S. 1881), which provides that vacancies in the office of mayor, city judge, clerk, or councilman, occurring in any manner, shall be filled by special election ordered by the common council, and conducted in the same manner as annual elections therefor, and all vacancies in the other offices shall be filled by the common council. This was the only provision in the act of 1869, concerning the filling of vacancies in office. It will be observed that there is no provision concerning the length of term the person elected under the said section to fill a vacancy in any office shall hold, but leaves it to the general law on that subject. The question is governed, therefore, by section 7, of "An act touching vacancies in office and filling the same by appointment, approved May 13, 1852," being section 7583, R. S. 1894 (section

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5567, R. S. 1881), which provides that "Every person elected to fill any office in which a vacancy has occurred shall hold such office for the unexpired term thereof." It is evident, from an examination of the title and body of this act, that this section applies to all appointments made to fill vacancies in the offices created by the legislature, when no different provision therefor is made by the constitution or statute, whether such appointment is made by a single person or by the people at an election, or by any other body, as the legislature, the common council of a city, trustees of a town, or board of commissioners of a county. *Baker, Gov., v. Kirk*, 33 Ind. 517. In the case last cited it was held that said section applied to the vacancy in office filled by the legislature of the State.

This court held, in *State, ex rel., v. Mayor, etc., of LaPorte*, 28 Ind. 248, that a councilman elected under section 3483 (3050), *supra*, to fill a vacancy, come under the provisions of said section 7583 (5567), *supra*. It has been uniformly held by this court that this section is applicable to all offices created or established by the General Assembly, unless some different provision is made by law concerning the same. *State, ex rel., v. Mayor, etc., of LaPorte, supra; Baker, Gov., v. Kirk, supra; State, ex rel., v. Chapin*, 110 Ind. 272; *Parmater v. State, ex rel.*, 102 Ind. 90, 95, 96, and cases cited. Said section is not applicable, however, when the constitution creates the office and fixes the duration or term of such office. *Governor v. Nelson*, 6 Ind. 496; *State, ex rel., v. Chapin, supra*, on p. 277; *Parmanter v. State, supra*.

It is provided by section 7815, R. S. 1894 (section 5731, R. S. 1881), that whenever a vacancy occurs in the office of county commissioner before the expiration of the term, the remaining commissioner or commissioners, together with the auditor, shall elect some

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person to fill such vacancy until the next general election. This court, in *Parmunter v. State, supra*, held that under said section the person chosen commissioner held until the next general election, when the voters could elect a commissioner, who would hold, under section 7583 (5567), *supra*, the remainder of said unexpired term. Section 7815 (section 5731), *supra*, authorizing the remaining commissioners and auditor to fill the vacancy, limited the term of the person so chosen until the next general election; if such limitation had been omitted from such section, the person chosen would be entitled to hold such office during the unexpired term of his predecessor, under the provisions of section 7583 (5567), *supra*, providing that the term of office should be for the unexpired term.

We think that any vacancy in the office of mayor, clerk, or councilman, treasurer or marshal, filled under the provisions of section 3483 (3050), *supra*, under which appellee was chosen, would be for the unexpired term of such officer; and the people could not elect until the election when they would have elected a successor to such officer, had such vacancy not occurred.

In 1891 (Acts 1891, p. 33), sections 3484, 3485, R. S. 1894, the legislature passed another act concerning vacancies in the office of mayor, clerk, and councilman. This act provided that all vacancies in the office of mayor, clerk, or councilman of any incorporated city, occurring in any manner, shall be filled by appointment by the common council, and that such appointee shall hold office until the election and qualification of his successor, who shall be elected at the next general election.

Under this act, the same rule would apply to the offices named, to-wit: mayor, clerk, and councilman, as was declared in *Parmunter v. State, supra*, concern-

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ing the office of county commissioner, and in *State, ex rel., v. Chapin, supra*, concerning superior judge. That is, the person chosen by the common council to fill a vacancy in the office of mayor, clerk, or councilman, under said act, would hold until the next general election, when some one could be elected to fill out the remainder of the unexpired term.

The act of 1891 does not, however, apply to city treasurer, nor in any manner change the law as it existed before the act was passed concerning filling vacancies in that office, and a person appointed by the common council to fill a vacancy in that office will, under the provisions of section 7583 (2567), *supra*, hold for the unexpired term.

It follows that appellant is entitled to hold the office of treasurer of the city of Tipton for the unexpired term for which Thatcher was elected. His term does not expire, therefore, until the first Monday in September, 1898, and his successor cannot be elected, under the law as it now is, until the election in May, 1898.

The court erred in overruling the appellant's demurrer to the first and third paragraphs of the information.

Judgment reversed, with instructions to sustain the demurrer to the first and third paragraphs of information, and for further proceedings in accordance with this opinion.

Mott et al. v. State, ex rel. Klitzke.

MOTT ET AL. v. STATE, EX REL. KLITZKE.

[No. 17,844. Filed June 17, 1896.]

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COSTS.—*Judgment For.*—One recovering a judgment for costs is entitled to recover only the costs for which he is liable.

SAME.—*Improper Taxation Of.*—*Judgment For.*—*Collateral Attack.*—A judgment for costs by a court, having jurisdiction, is not void on the ground that it is excessive, or that items entering into it should have been omitted; and, therefore, is not subject to collateral attack.

MANDAMUS.—*Trial by Jury.*—An issue of fact, in mandamus proceedings, must be tried by jury if demanded by either party.

From the Lake Superior Court. *Reversed.*

P. Crumpacker, for appellants.

R. Gregory, for appellee.

HOWARD, J.—The relator, who is a minor, was fined in the Hammond city court, for the violation of an ordinance of said city. On appeal from this judgment to the Lake Superior Court, the relator was found not guilty, and recovered a judgment for costs against the city. On the refusal of the city to pay the judgment so recovered, this action was brought by the relator for a writ of mandate against the appellants, who are the mayor, common council, and clerk of said city, to require the allowance of his claim and the issue of a warrant for its payment. The trial resulted in the granting of a peremptory writ of mandate as prayed for.

The judgment for costs in the original case was general, and did not name any particular items of cost. The amount, however, was ascertainable from

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the fee-book. Complaint is made by appellants that many items of fees are taxed on the fee-book, and so made a part of the judgment, which were not payable as costs by the city. This complaint, at least in part, seems to be well founded. Only the fees and costs for which the relator was himself liable could be recovered by him on his judgment against the city. Any costs not made by him could not be recovered by the relator. It is only the fees for which a party is liable that he may recover as costs against the other party. *Keifer, Sheriff, v. Summers, et al.*, 137 Ind. 106. The fees primarily due by the losing party are collectible from such party on fee bill, and cannot be made part of the judgment in favor of the other party. But in this case, all the fees taxed on the fee-book, whether due by the relator or not, were added together to make up the judgment rendered against the city.

As the record stands, however, it is not altogether clear how the appellants are to avail themselves of the error, if one was committed, as seems to have been the case. If it be true that some of the costs, either before the city court or before the superior court, were made by the city, and being therefore no concern of the relator's should, consequently, not have been made a part of the judgment in his favor; yet the record does not show that there was any ruling on a motion to tax costs, or any other step taken to modify the judgment. It is not denied that the relator was entitled to a judgment for some costs. But the court, having jurisdiction, the judgment would not be void, simply on the ground that it is excessive, or that items entered into it that should have been omitted. *Gum Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158 (30 L. R. A. 700 and notes).

It is plain, however, that in the case at bar it was a question of fact for the court to ascertain from the

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fee-book, and from the other evidence offered, the exact amount of the judgment. The judgment in the original case being for costs simply, the amount of this judgment must be determined. The fee-book furnished the basis for this determination. All the fees and costs there taxed, and which the relator had paid, or which in law he was liable to pay, constituted, when taken together, the amount of his judgment. For the payment of this amount, he was entitled to a mandate, requiring the city authorities to issue to him a warrant upon the city treasury. If, however, any of the fees or costs found taxed in the case were those for which he was not himself liable, such items would form no part of his judgment.

It was said in *State, ex rel., v. Burnsville Turnpike Co.*, 97 Ind. 416, that, under our code, "When the facts are admitted, the relator's right to a peremptory mandamus becomes a question of law, to be disposed of upon motion, and in the sound discretion of the court; but that where an issue of fact has been formed upon the return, such issue must be tried and determined before final judgment can be rendered." And it was there held, that an issue of fact in mandate must be tried by a jury, if either party demands it; the proceeding being at law, and not in equity.

In the case before us, issues of fact were formed upon the return by an answer in general denial and by two special affirmative paragraphs of answer. To try the issues so formed the appellants asked for a jury, but the court refused the request. This was error.

In this decision we have not considered what effect, if any, the statute, section 3513, R. S. 1894 (section 3078, R. S. 1881), which provides, that, "in no case shall the city be liable for costs," might have had in the original case. *Tuley v. City of Logansport*, 53 Ind.

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508. The court had jurisdiction in the case, and its judgment, even though erroneous, was not void, and cannot be attacked collaterally in the case here appealed from.

The judgment is reversed, with instructions to sustain the motion for a new trial.

ALBAUGH v. STATE EX REL. TITSWORTH.

[No. 17,790. Filed June 17, 1896.]

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OFFICERS.—Township Trustee.—Failure to File Bond within Time Required by Law.—Statute Construed.—A township trustee, elected at the general election in November, 1894, whose term of office might have begun at any time within ten days after his election, does not forfeit the office by failing to file his bond and oath of office within ten days after his election as required by section 7542, Burns' R. S. 1894, (5527, R. S. 1881).

SAME.—Township Trustee.—Failure to Qualify.—Compensation.—A township trustee who, through his own mistake and that of others as to the time when his term of office rightfully began, failed to qualify until after such time, is entitled to compensation only from the time he lawfully qualified and was rightfully entitled to the office.

From the Benton Circuit Court. *Reversed.*

E. F. McCabe, for appellant.

Fraser & Isham, for appellee.

HACKNEY, J.—The appellant, who had been previously elected to the office of township trustee of Oak Grove township, Benton county, was holding over, because of the death of one elected as his successor, but who had failed to qualify. On the 6th day of November, 1894, the relator was duly elected to said office. On the 16th day of November, 1894, the relator's agent visited the office of the auditor of said county, taking the certificate of the relator's election

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and exhibiting it to said auditor. At the same time said agent had in his possession a document signed by the relator and others, claimed to have been a bond for the faithful discharge of his duties as trustee of said township. Said agent had also, at the same time, a written oath, taken by the relator, as to the faithful discharge of his duties as such trustee. This document said agent did not exhibit to said auditor, but he did inquire as to when the auditor "was going to approve trustee bonds," telling him at the same time that he had Titsworth's bond, and the auditor, who was of the opinion that the term of office of trustees, then recently elected, would not begin until the following August, answered that "he would not approve any bonds of trustees until along the next summer." The document mentioned was not left with or tendered to the auditor, but was subsequently lost by said agent. On the 27th day of June, 1895, the relator filed with said auditor a bond and oath of office, to the approval of that officer, and on August 15, 1895, instituted this proceeding in *quo warranto* to oust the appellant from said office of trustee, and to recover the emoluments of said office. In addition to the facts already stated, it was shown, upon the trial, that the appellant had maintained the view, which he had stated after the election in 1894, that he was entitled to occupy the office in question until in August 1895. The relator's certificate of election gave the date of the beginning of his term of office as "the first Monday in August, 1895." It is a matter of general notoriety that the prevailing impression was that the terms of office of trustees then elected would begin on the first Monday in August, 1895, under and pursuant to the act of March 9, 1889 (Acts 1889, p. 344), notwithstanding the act of March 2, 1893 (Acts 1893, p. 192), which changed the time for elections to such office from

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April to November. It is a fair inference also, from the circumstances and the conduct of the relator, that it was his opinion that the term of the office to which he had been elected, did not begin until the first Monday in August, 1895. It is now conceded, however, that the term of said office might have begun at any time within ten days after said election, upon the qualification of the relator therefor.

The appellant's theory of the controversy is, that the relator, by his failure to file his bond and take the oath of office within such period of ten days after said election, waived his right to do so later, and on the 27th day of June, 1895, and that he, the appellant, was entitled to hold over further because of such failure by the relator.

The lower court denied this theory, and ousted the appellant and gave judgment against him for \$338.00, the emoluments of said office from the 16th day of November, 1894, to the time of the trial.

The statute provides, that "If any officer of whom an official bond is required shall fail, within ten days after the commencement of his term of office and receipt of his commission or certificate, to give bond in the manner prescribed by law, the office shall be vacant." R. S. 1894, section 7542. Upon this provision the appellant predicates his theory of the case.

This provision of the statute is, with respect to the question here involved, the same that was passed upon in *Board of Commissioners, etc., v. Johnson*, 124 Ind. 145 (7 L. R. A. 684). That provision was to the effect that "upon failure to * * * to give such bond, his office shall become immediately vacant." It was held that the requirement was directory, and not mandatory. It was said: "This rule is carried very far, for it is held, without substantial diversity of opinion, that unless the statute makes the

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filing of a bond within the limited time a condition precedent to the right to the office, the failure to file it within the time prescribed will not work a forfeiture of the right to the office nor create a vacancy. In the case of the *City of Chicago v. Gage*, 95 Ill. 593 (35 Am. Rep. 182), the statute provided that upon failure to file a bond within the time designated the person chosen shall 'be deemed to have refused the office, and the same shall be filled by appointment,' and it was held not to change the rule. In *State v. Toomer*, 7 Rich. (Law) 216, the provision of the statute was that upon the failure of the person elected to file a bond within the time limited, 'his office shall be deemed absolutely vacant, and shall be filled by election or appointment,' and the court adjudged upon full consideration that title to the office was not lost. But we cannot further quote from the adjudged cases, and we cite them without comment. *State v. Colvig*, 15 Ore. 57; *State, ex rel., v. Peck*, 30 La. Ann. 280; *State v. Ring*, 29 Minn. 78."

"A supervisor, by failing to take the oath in the time prescribed by law, does not vacate his office." This proposition was held in *Smith v. Cronkhite*, 8 Ind. 134, the statute now in question then having been in force.

In *State, ex rel., v. Johnson*, 100 Ind. 489, the doctrine was recognized that forfeiture, under the statute here in question, for delay beyond the period of ten days, will not be enforced, and it was said, that if the person elected show himself not to be in fault in permitting the time to elapse without filing the bond; he will not be deemed to have abandoned the office. It is manifest that the legislature intended to prevent unnecessary delay in assuming the duties of an office to which one has been elected in order that the public service may not suffer, and that the chosen servant

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may thereby signify his intention to accept the trust. The construction of all statutes looking to the efficiency of the public service should be liberal in promoting the choice of the people. In this instance, the beginning of the term was in substantial doubt; that doubt had been promoted by the expressed opinions of the appellant, by the language of the certificate of election, by the action of the auditor, and by the prevailing general opinion of the public.

The choice of the people and the rights of the relator may not be thwarted upon an erroneous decision, supported by so many weighty considerations. It will be observed that the ten days mentioned in the statute, began to run from the "commencement of his term." The time of the commencement of his term was involved in substantial legal doubt, and was not determined until the recent case of *State, ex rel., v. Wells*, 144 Ind. 231.

Treating the visit to the auditor by the relator's agent as for the purpose of complying with the law, and as indicating an intention not to abandon the office, and regarding the doubt as to the commencement of the term, we think the relator excusable in not filing his bond on or before the 16th day of November, 1894, and that he was entitled to the office upon the filing of the second bond. This conclusion, however, does not support the claim of the relator to the compensation received by the appellant, between the 16th day of November and the time when he filed his second bond. The relator was not entitled to compensation before he qualified as an officer, and gave bond for the faithful discharge of the duties of the office. This he did not do until June 27, 1895. The conduct of the relator very clearly indicates his decision that the term did not begin in November when his agent visited the auditor. We are not advised by

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the evidence as to the stipulations of the bond then in the possession of his agent, nor is it disclosed as to what were the obligations of the alleged oath of office. The stipulations of the bond and the oath taken may have related to the duties of the office from and after the first Monday in August, and not from the date when the certificate was exhibited to the auditor. If the relator ever regarded the inquiry as to the approval of the first bond, as a filing of that bond, he certainly abandoned that theory when he prepared another bond, with other securities, and filed it, not as a substitute for the first, but as an original bond.

In our opinion, the trial court should have granted the appellant's motion for a new trial.

The judgment, therefore, is reversed, with instructions to grant the motion for a new trial.

MCCABE, J., did not participate in this decision.

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[No. 16,477. Filed March 15, 1893. Rehearing denied June 17, 1896.]

RELIGIOUS SOCIETIES.—*Religious Freedom.*—*Right of Church Member.*—The provision of the Federal constitution declaring that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and of the State constitution that "All men shall be secured in their natural right to worship God according to the dictates of their own conscience," do not give to a church-member the right, after he has repudiated the faith and doctrine upon which his church was founded, to exercise and enjoy the benefits and privileges of a member of such church, contrary to the rules and laws upon which such church was established. *p. 365.*

SAME.—*Church.*—*Rules of Decorum.*—*Change in Articles of Faith.*—

Where a church requires of its members that they all subscribe or assent to its articles of faith, a rule of decorum providing that all questions coming before the church shall be disposed of by a ma-

145	361
156	209
156	210

145	361
167	286

145	361
171	116

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jority, except as to the reception of members and the appointment of officers, which shall be by unanimous vote, does not authorize a change in the articles of faith by a majority. *p. 378.*

SAME.—*Baptist Association.*—*Church Doctrine.*—*Evidence.*—Though an organization of Baptist churches, known as an “association,” has only advisory power as to questions that may arise in the individual churches comprising the association, yet if two factions of one of the churches, each claiming to be the true church, present their claims to such association, its decision, while not conclusive on the courts, is entitled to very great weight. *p. 385.*

SAME.—*Ecclesiastical Law.*—*Jurisdiction of Civil Courts.*—The courts of this State have no ecclesiastical jurisdiction, and will not decide questions of ecclesiastical law, except where such law becomes a fact upon which the property-rights of religious societies, corporations, or churches depend. *p. 375.*

SAME.—*Church.*—*Factions.*—*Property-rights.*—Where the membership of a church is divided into two factions, each claiming to be the church, the title to the church property is in that faction, even though it be the minority, which is acting in harmony with the doctrines and practices which were accepted and adopted by the church before the division took place. *p. 390.*

SAME.—*Church.*—*Factions.*—*Expulsion of Members who Adhere to Original Faith.*—*Property-rights.*—Where the membership of a church is divided into two factions, the expulsion by the majority of the members of the minority, who still adhere to the original faith, does not affect the rights of such minority to the church property. *p. 412.*

EVIDENCE.—*Judicial Notice.*—*Historical Facts.*—The court may take judicial notice of historical facts. *p. 412.*

SAME.—*Articles of Faith Cannot be Contradicted by Parol.*—The articles of faith of a church being a solemn written compact, are conclusive on the question of faith, and cannot be contradicted by parol evidence. *p. 420.*

PLEADING.—*Answer.*—*Abatement.*—An answer which pleads matter in abatement, along with matter in bar, and asks judgment on the merits, thereby waives the matter in abatement. *p. 323.*

From the Boone Circuit Court. *Reversed.*

W. E. Niblack, C. S. Wesner, T. W. Lockhart,
and *A. C. Harris,* for appellants.

Terhune & Higgins, for appellees.

MCCABE, J.—This was an action for the recovery of the possession of real estate, in the ordinary form

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under the code, brought by appellants against the appellees. A change was taken from the court, and the special judge called to try the case first, the Hon. Ralph Hill, made a special finding of the facts and stated conclusions of law, upon which judgment of recovery of the possession in favor of appellants followed. A new trial, as a matter of right under the statute, was granted to the appellees. That special judge declining to hear the case again, the Hon. William M. Franklin was called and tried the case again without a jury. He found generally for the defendants, the appellees, and, over a motion for a new trial, rendered judgment for appellees, the defendants below. The only error assigned here is the overruling the motion for a new trial. The grounds of that motion are, that the finding of the court is not supported by, and is contrary to the evidence and the law.

The real estate sought to be recovered in the action, is a church building, erected on the land described in the complaint for, and was used as a house of worship unitedly by the Mount Tabor Regular Baptist Church, of Boone county, Indiana, from a time when the building was erected, shortly after the date of the deed conveying the land to her trustees named, and their successors in office, for the use of said church, on June 30, 1857, until the summer of 1889, when a division took place in the congregation, on account of a difference in belief between the two factions on points of doctrine and practice. Ever since the last named date, each of these factions has been claiming to be the only Mount Tabor Regular Baptist Church; the appellants being the trustees lawfully elected by the minority faction, and the appellees being the trustees elected by the majority. This state of affairs renders it incumbent on the court to ascertain from the evidence, if we can, which one of these factions

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represents, and is the real and true Mount Tabor Regular Baptist Church, if either one is. This involves an inquiry into certain religious doctrines and practices of that church, as a religious society or body. Not because the law which we are to declare recognizes any particular form of doctrine or faith and practice as the true one, nor because the law requires any form of doctrine or religious belief from anyone, or from any society or church whatever; but because, in a case of a divided congregation of a church or religious society on account of a difference of religious belief, faith, and practice between the disagreeing divisions, it may become necessary, where there is a dispute as to the title to the church property, to inquire which faction, or division, still adheres to the original faith and doctrine, rules and laws upon which the church was founded, if either does, and which one has departed therefrom, if either has; these religious doctrines, faith, and practices, rules and laws, on which the particular church was founded, and the present faith and beliefs of the contending factions, are listened to by the court, not for the purpose of arriving at fundamental or ultimate religious truth, or for the purpose of learning about our true relation to the supposed author of our being, or what our state is to be after this life; but these religious doctrines and practices are listened to by the court solely as facts, upon which civil rights, and rights to property are made to depend, regardless of the ultimate truth or soundness of such doctrines, practices, and beliefs. Indeed, ever since the complete separation of church and state, in the crowning glory of civil government among men, by the constitution of the United States, declaring that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," which was followed by similar provisions in

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most of the state constitutions, and especially our own, the law has known no religious creed, no religious opinion, no religious doctrine, no standard of belief, in matters pertaining to religion. Our State Constitution, framed by wise men, and adopted by the people, has still more securely placed us out of the reach of those fierce and bloody struggles arising out of a difference in religious opinion in former times, by declaring that "All men shall be secured in their natural right to worship Almighty God according to the dictates of their own consciences," and that "No law shall in any case whatever control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience," and that "No preference shall be given by law to any creed, religious society or mode of worship; and no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent," and that "No religious test shall be required as a qualification for any office of trust or profit."

These provisions of the fundamental law not only take away all power of the State to interfere with religious beliefs, but they leave the citizen perfectly free to repudiate the faith and belief he once professed, and adhere to and adopt a new creed and faith differing from that of the church to which he belongs, or he may repudiate his old belief and faith without adopting any new one, and these changes he may adopt as often as to him may seem proper, and the law will protect him in it. In other words, the law allows every one to believe as he pleases, and practice that belief so long as that practice does not interfere with the equal rights of others.

But that is a very different thing from the claim of a right of a church member to repudiate the faith and doctrine upon which his church was founded, and at

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the same time insist on his right to exercise and enjoy the benefits and privileges of a member of such church, contrary to the rules and laws upon which such church is established.

The main contention of the appellees is that they represent the majority of the members of the church that belonged thereto at the time that the division took place, and that the acts, rules and orders adopted by them in the regular course of church business are the acts of Mount Tabor Regular Baptist Church, and therefore binding on all members, both majority and minority, whether those acts were in accord with the laws, usages, practice, faith, and belief upon which the church was originally founded or not.

In other words, their contention substantially amounts to this: that the acts of the majority, done in the regular course of church business, is the law of the church, no matter how great the departure from the original faith and law upon which the church is founded.

While the appellants contend that the acts of the majority, though done in the regular course of church business, but in violation of the laws, usages, faith, and principles upon which the church was founded, and over the protest and objection of the minority, are not binding on anybody, and are not the acts of the church.

We have read the evidence, which is very voluminous, consisting of over six hundred printed pages, and find that there is no substantial conflict on any material point in the case.

This church was organized on the third Saturday of July, 1835, and it then adopted articles of faith, which read as follows, to-wit:

“A declaration of the faith and practice of the church of Jesus Christ, called Mount Tabor. Having

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been enabled, through Divine grace, to give up ourselves to the Lord, and likewise to one another, by the will of God we count it a duty incumbent upon us to make a declaration of our faith and practice to the honor of Christ and to the glory of His name, knowing that with the heart man believes unto righteousness, so with the mouth confession is made unto salvation.

“First. We believe in one only true and living God, and that there are three that bear record in heaven, the Father, the Son, and Holy Ghost, and that these three are one.

“Second. We believe that the Scriptures of the Old and New Testament to be of Divine authority, and the only infallible rule of faith and practice.

“Third. We believe in the fall of man, and that all of Adam’s posterity are sinners by nature, and that they have neither will nor power to save themselves from their tempted and sinful state by their ability which they possess by nature.

“Fourth. We believe in the election by grace, according as He has chosen us in Him before the foundation of the world, that we should be holy and without blame before Him, in love, having predestinated us to the adoption of children by Jesus Christ to crown us according to the good pleasure of His will.

“Fifth. We believe that sinners are justified by the righteousness of God, which is in Jesus Christ imputed to them by Divine and supernatural operation of the spirit of God, and that they are kept by the power of God through faith unto salvation.

“Sixth. We believe that baptism and the Lord’s supper are ordinances of Jesus Christ, appointed in His church, and none but true believers are fit subjects for either; and that the proper mode of baptism is immersion.

“Seventh. We believe that no minister has a right to administer those ordinances only such as have been regularly baptized and come under the interposition of the hands of a presbytery by the authority of the church of Jesus Christ.

“Eighth. We believe in the resurrection of the body, both of the just and the unjust, but everyone in his own order; they that have done good to the resurrection of life, and they that have done evil to the resurrection of damnation; and that God has appointed a day in which He will judge the world in righteousness by Jesus Christ, and that the joys of the righteous will be eternal, and the punishment of the wicked everlasting.

“Ninth. All of which doctrines are contained in the Old and New Testament, and we do agree sincerely to practice and maintain them to the glory and honor of the Lord Jesus Christ, and to the mutual peace and comfort of one another.”

And the church adopted at the next meeting in August of that year the following rules of decorum, to-wit:

“First. It shall be the duty of the church to appoint a moderator, and it shall be the duty of the moderator, when appointed by the church, to open the meeting by singing and prayer, at least by prayer; give time and opportunity for any business that may come before the church; keep order and reprove the unruly.

“Second. It shall further be the duty of the moderator to notify the brethren of sister churches that may visit us to sit with us; and who so notified shall be at liberty to give their views on any question that may come before the church, but not to vote on the decision.

“Third. To open a door for the reception of mem-

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bers in the church; to give time and opportunity for matters and dealings that may be in gospel order.

"Fifth. To give time for reference, giving preference to matters touching fellowship.

"Sixth. It shall be the duty of a member, when he wishes to speak to any question, first to rise from his seat and address the moderator in a Christian-like manner; and when speaking, if he shall wander from the subject, it shall be the duty of the moderator to call him to order; and when called to order, he shall immediately sit down, unless suffered to explain himself by the church.

"Seventh. No brother shall speak more than twice to any question without leave from the church.

"Eighth. No motion shall be taken up in the church without first being seconded.

"Ninth. All questions coming before the church in order, shall be taken up and determined by a majority, except the reception of members in the church and appointing officers, which shall be by unanimity, except there be but two objectors. In that case, the objectors will let their objections be known, and then, if the church think them to be trifling and unfounded, they may act as if there were no objections.

"Tenth. We declare an unfellowship with all benevolent institutions designed for religious purposes; that is to say, Sunday and theological schools, Baptist conventions, temperance societies, foreign and home mission societies.

"Eleventh. It shall be the duty of the clerk of this church to keep a record of all proceedings of this church in a book provided by the church for that purpose, and sign the orders of the church; and also to keep a list of the names of members in the church separate from any other business of the church."

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The evidence shows that all "Regular" Baptist churches in the United States are founded on substantially the same articles of faith and rules of decorum as those copied above, upon which Mount Tabor Regular Baptist Church was founded, and that these written documents are treated by all such churches as their constitution and law of their existence. The evidence further shows, without any contradiction, that the government of these churches is congregational in form, and that each church is the governing power for itself. The evidence also in like manner shows that the only other ecclesiastical body connected with these local churches is what is called the association and the council of the Regular Baptist churches. The association is an annual meeting, composed of messengers carrying a letter from each church belonging to the association, which letter generally gives some expression of the continued adherence of the church to their articles of faith, a detailed account of the condition of the church, its progress, travels, trials, and troubles, if any, since the last meeting of the association; which letter constitutes the credentials of such messengers upon which they are either admitted to seats in the association as representatives of the particular local church named in the letter, with power to vote on all questions coming before the association, or they are refused such seats, as to the association shall seem proper, according to the laws, usages, and practices of the Regular Baptist churches and their associations.

The Mount Tabor Regular Baptist Church joined, and became a member of what is known as the Danville association. This association was organized in 1853. Those parts of its constitution material to the question here involved are as follows, to-wit:

"1. The association shall be established on the

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principles of the union, and shall be composed of members chosen by the different churches and sent to represent them in the association, who, upon producing letters certifying their appointment, shall be entitled to a seat.

"2. The letters from the different churches shall be expressive of their situation, together with their days of their church meetings.

"3. The members thus chosen and convened shall be denominated the 'Danville Association,' but shall not have power to lord it over God's heritage so as to infringe on any of the internal rights of the churches. Nevertheless, we agree that the churches composing this association shall stand in the same relation to each other in the association as the individual members in churches do to each other, viz: If one church trespass against a sister church she shall be dealt with according to the directions given in the 18th chapter of St. Matthew, and other scriptures which respect discipline; and if she cannot be regained, shall be dropped from the union, and the association will not take cognizance of any case of the above kind unless the above proceedings shall have been had thereon."

Section 5 provides for a moderator and clerk, to be chosen by the members, to continue in office until the letters of the next association are read and the names of their messengers enrolled, and in case of a failure of the moderator, the clerk shall nominate one to act; and in case of the failure of the clerk, the moderator shall nominate one to act. Section 6 provides that the moderator shall keep order, state all questions fairly, collect the suffrages of the churches, etc., and vote only in case of a tie. Section 7 provides for the keeping of a record by the clerk of the proceedings.

"8. It shall be the duty of any church wishing to

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join the association, to apply by letter and messengers, to state their faith and by whom constituted, unless it be a church dismissed by letter from a sister association in our union.

"9. Any association wishing to correspond with this association must express her faith in her letter, and if not objected to, shall be received, and when received, her messengers shall be entitled to a seat in council.

"10. All queries laid before the association shall be first debated in the church where it originated, and if they cannot decide on it, they shall insert it in their letter. * * * *

"12. The association shall give advice to the churches in matters of difficulty." * * * * Section 17 provides that by a two-thirds vote this plan of government may be amended.

The evidence shows that twenty-two churches compose the Danville Association, and did so at the time the division took place in Mount Tabor Church, and are still members of that association. The council is a body of messengers or representatives of a number of sister churches, generally belonging to the same association, that may be called by a church wherein internal difficulty has arisen in such church where such church is unable to settle the difficulty herself.

The difficulty which resulted in the unfortunate division of Mount Tabor Church, arose out of a difference of opinion and belief as to a certain doctrinal point which sprang up between the members shortly previous to the division. That difference related to the "means" by which sinners are to be made Christians. The majority, represented by appellees, believe in the use of "means" for that purpose, while the minority, represented by the appellants, do not believe in the use of means for that purpose. And thus they became

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designated as the "means" party and the "anti-means" party. The difference between the two beliefs upon that point is aptly explained by the two leading witnesses, one on behalf of appellants, and the other on behalf of appellees. Elder Shirley, on behalf of appellees, stated that "The anti-means brethren believe that sinners are regenerated by personal contact with the Holy Spirit; that persons are regenerated without means or any instruments whatever; that it is the sole original work of the Holy Spirit. While the means believe the work of regeneration, the power of quickening, is, in every sense, by the Holy Spirit, yet, that God uses the ministry of the gospel and Christian service and prayers and intercessions, as a means of leading sinners to Christ; and hence, that they are quickened, being penitent of their sins, by the Holy Spirit and the life that comes from God. The anti-means party declare that just as many sinners of Adam's race and of the different nations would be saved if there never had been a Bible written or a sermon preached. While the means party believe that ministers are now working under the original commission that Christ gave the apostles, and that it is God's wish and God's plan that the gospel shall be preached, * * and He has promised He will go with them to bless the word preached for the regeneration of sinners and the up-building of the church of Christ."

Elder E. D. Thomas, on behalf of appellants, testified as to the difference as follows, to-wit: "When simmered down to its finest point, one party believes that the Holy Spirit acts independently, directly, and through no communication whatever except the immediate contact with the life-giving spirit given to the sinner's heart. The other party believes that God does sometimes communicate the same life-giving power in some other way than directly and abstractly.

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I never limit Jehovah * * let Him do just as He pleases. * * * But I don't believe He needs any vehicle to convey His spirit. * * But when persons take the position that God has to have the gospel as a vehicle, or He has to have the gospel, or something else, as a means in order to get to the sinner, then it is seriously objected to * * * by the anti-means party; * * * as the thief on the cross * * * there was no gospel there at all, yet God quickened and saved him."

There is no conflict in the evidence that the foregoing statements truly represent the substantial and real difference in doctrine between the majority and minority divisions of Mount Tabor Church. It is true, there was some evidence tending to show that the doctrine of the means party leads to the fostering of Sunday schools and missions by the majority, but there was some conflict on those points, and we cannot weigh the testimony so as to disturb the finding of the court on any point where there is a conflict of evidence. There is no dispute between the parties that the foregoing difference of opinion existed in the church, and led to, and was the cause of the division; it is also conceded that the evidence shows that this difference in belief arose a short time before the division; and appellees' counsel contend that the above defined belief of the majority was the original belief and faith of the church on that point, and that the above defined belief of the minority was new, an innovation, and a departure from the original faith of the church. But all the evidence tends to prove, without a conflict, directly to the reverse of this contention. The articles of faith, which the evidence shows, are subscribed or agreed to by each member in the church, would amply warrant us, were it a secular document, in holding that

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the above defined belief of the minority, represented by appellants, was the original belief and faith of Mount Tabor Church, and that the above defined belief of the majority, represented by appellees, was an innovation and a departure therefrom.

While the courts of this State have no ecclesiastical jurisdiction whatever, yet they are charged with the duty and clothed with the jurisdiction of protecting property-rights of religious societies, corporations and churches, as well as that of individuals, and thereby, of necessity, they may be compelled to decide a question of ecclesiastical law when that law becomes a fact upon which property-rights depend. They ought not, however, to be inclined to "Rush in where angels fear to tread," and where necessity does not compel them.

In *Roshi's Appeal*, 69 Pa. St. 462, it was said: "That it is the duty of the court to decide in favor of those, whether a minority or majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of worship in practice, as also in favor of the government of the church in operation, with which it was connected at the time the trust was declared." * * *

"The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began, are the standard for determining which party is right." These quotations from the case named are but quotations from previous cases, a long line of which, both English and American, are cited in that case. That case has been so frequently quoted with approval by American courts of last resort on questions of this kind, that the principles announced therein may be regarded as settled law in

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this country. This court, in the case of *White Lick Quar. Meet. of Friends, et al. v. Same*, 89 Ind. 136, quoted from that case with approval, the same we now quote, but the quotation was not so applicable to that case as it is to this.

The controversy in *Roshi's Appeal, supra*, as here, was between two factions of a divided congregation over the title to the house of worship and the ground upon which it was situated; and there, as here, the church was organized in 1835. The lot was afterwards conveyed by the owner to three named "trustees of the German Reformed Church, in trust for the use of the said German Reformed Church." The house was erected afterwards. The lot here in question was conveyed by the owner on the 12th day of October, 1857, to three named "trustees of the Mount Tabor Regular Baptist Church of Jesus Christ, in Boone county, for the use of said church, for the sum of \$75.00." The house was afterwards built on it by the church. The court, in the case quoted from, further said, in relation to the title deed in that case, equally pertinent to this, that "a religious society, incorporated or unincorporated, is but the trustee of a charity, and it has always been peculiarly within the province and duty of a court of equity to prevent the diversion of property, held in trust for such purposes, from the object and design of the original endowment. * * * Whenever a church or religious society has been originally endowed in connection with, or subordination to, some ecclesiastical organization and form of church government, it can no more unite with some other organization, or become independent, than it can renounce its faith or doctrine and adopt others. * * * It was *ultra vires*. They might, indeed, as individuals, have formed any kind of church they pleased, independent or connected with any other

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ecclesiastical organization. The land was before them, but then they must cease to be a German Reformed Church, and abandon all claim of right to hold any of the property of that church. It was a part of their religious liberty, guaranteed to them by the constitution of the Commonwealth, to separate from their former association, if they became dissatisfied with its faith or order, and build for themselves another church and organize on other principles; but it was no part of that liberty to appropriate to themselves, in their new capacity, property which had been solemnly consecrated to other uses. * * *. To this question there can be but one answer in law, equity, good conscience, justice as well to the living as to the dead." The court adjudged that the minority were acting in harmony with the law of the church, and that they were entitled to the property. These principles were recognized and reaffirmed by this court in the late case of *Lamb, et al. v. Cain, et al.*, 129 Ind. 486, where it is said, that, "there is no doubt that a person owning property in his own right may dedicate such property, by way of trust, to support and propagate any definite doctrines or principles, provided it does not violate any law of morality, and sufficiently expresses in the instrument by which the dedication is made the object of the trust. In such cases it is the duty of the courts, in a case properly made, to see that the property so dedicated is not diverted from the trust attaching to it, and so long as there are persons in interest, standing in such a relation to the property as that they have a right to direct its control, they may prevent the diversion of the property to any use different from that intended by the donor. If such trust is confided to a religious denomination or congregation it is not in the power of a majority of that de-

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nomination or congregation, however large the majority may be, by reason of a change of religious views, to carry the property thus dedicated to a new and different doctrine." The particular doctrine, practice, and faith of Mount Tabor Regular Baptist Church, as expressed in their articles of faith and rules of decorum, had been long established, and were well known and regarded by all as the law of the church when the deed in this case was made conveying the lot to the three trustees named, for the use of said church. We, therefore, do not think it was in the power of the majority, by reason of a change of religious views, to carry the property thus dedicated to a new and different doctrine.

But counsel for appellees, as before observed, have mainly relied on the rules of decorum to justify the action of the majority. The 9th section thereof, as we have before seen, provides that "all questions coming before the church in order shall be taken up and determined by a majority, except the reception of members in the church and appointing officers, which shall be by unanimity, except that there be but two objectors. In that case, the objectors will let their objection be known, and then, if the church thinks them to be trifling and unfounded, they may act as if there were no objections." This rule cannot be held to authorize a change of faith and practice by a vote of the majority, as contended. The evidence shows that all members, according to the usages and practice of the Regular Baptist Churches, are expected to either subscribe or assent to the articles of faith, or be in harmony therewith, in faith and belief. Hence, the propriety of the exception to the right of the majority to rule, in case of receiving members into the church. If the candidate does not give satisfactory evidence that he is in harmony with the articles of faith, the

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fundamental law of the church, in his faith and belief the majority cannot carry him into the church and make him a member. If the majority cannot admit one who does not believe or acquiesce in the articles of faith, then it would be equally true that the majority have no power to change the faith of the church against the objection or protest of the minority. As well might it be contended that a banking corporation or association, by a majority vote of its stockholders or directors, could change its business from banking to insurance business, or into that of a railroad company against the protest of the minority, and *vice versa*.

But if we had any doubt as to the correctness of our construction of the fundamental law of this church, contained in the articles of faith and rules of decorum, that doubt would be entirely cleared away by the action of the Danville Association, to which this church belonged, and the action of two councils, to each of which these very troubles were submitted.

In 1889 both factions claiming to be the church, sent a letter and messengers to the association. These letters were both returned to the senders, requesting and advising them to become reconciled; the minority then, in accordance with Baptist practice, usages and custom, requested the majority to join them in calling a council from sister churches, which the majority declined to do. The minority called a council, consisting of messengers, or representatives, from seven sister churches; that council met, the minority appeared before them and requested the majority to do the same, but they declined. The council heard the evidence in support of the charge that the majority had departed from the faith, and other matters, and found the charge true, which was reported back to the churches sending the members of the council.

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The majority paid no attention to these things, further than to exclude the minority from the church because of these proceedings. Before the next association met, another council was called from a majority of the churches composing the association, an unavailing request having been made of the majority by the minority to take part in it, which they declined. That council also heard the evidence in support of the charge against the majority, and it also decided that the charge of departure from the faith, contained in the articles of faith, was established against the majority, and that the minority was the true Mount Tabor Church, walking in gospel order. And they recommend to sister churches to recognize the minority as the Mount Tabor Church.

Both parties again sent letters and messengers to the next meeting of the Danville Association in 1890, the majority and the minority, each claiming to be the only true Mount Tabor Church, and each inserting in its letter, its respective version of the controversy. The association unanimously received the letter from the minority, and admitted her messengers to seats in the association, as the representatives of the only true Mount Tabor Church, and recommended that sister churches of their faith and order should recognize the minority as the true Mount Tabor Church. And the association refused to receive the letter of the majority, though it was read and discussed, and refused to admit the messengers of the majority to seats in the association. This action was on the ground that the majority was guilty of a departure from the faith expressed in the articles of faith.

In *White Lick Quar. Meet. of Friends v. Same, supra*, this court said: "The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters

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which concern the doctrines and discipline of the respective religious denominations to which they belong." Therefore, we feel doubly assured that the decision we reach on the question of doctrine and departure from faith by the majority is correct, since three several ecclesiastical tribunals of this church have so construed the articles of faith, rules of decorum, and the doctrine believed and practiced by the majority.

But it is contended that the decisions of these ecclesiastical courts, the councils and the association, is not binding on anybody, much less that they are binding on the civil courts. This extraordinary position is earnestly and, we may say, even ably contended for, on the ground that the Regular Baptist Church government, being congregational, and therefore independent of any higher judicatory than the local church itself, and the powers of the council and the association; if the particular church concerned, or majority thereof, sees fit not to take the advice of the association, that such majority may go on as they please. It must be conceded that the evidence shows that the power of the association is only advisory, and the same is true of the council; the association, however, as shown by the evidence, has plenary power where two sets of messengers, with separate letters from each of two factions into which a church is divided, and each claiming to represent the true church, to authoritatively declare which is the true church, by the reception of one of these letters and by the admission of the messengers of that one to seats in the association. But it is earnestly contended that by the church polity and government of the Regular Baptist denomination, as shown by the evidence, a church may withdraw from an association and still continue to be a Regular Baptist church, with all powers it had before

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it joined the association, and hence the refusal of the association to receive the letter and messengers sent by the majority, amounted only to a withdrawal of Mount Tabor Church from the Danville Association. The majority were not seeking a withdrawal, but recognition as the only true Mount Tabor Church, and admission to seats as such by her messengers in the Danville Association. Defeated in that, they turn around and say the Danville Association had no power to enforce her decisions, and they assume to withdraw Mount Tabor Church from the Danville Association, and they organize a new association and join it, called Mount Tabor Association. But they are foiled in that, because, from the records of the Danville Association, shown in evidence, it appears that Mount Tabor Church is still a member of the Danville Association. While the evidence clearly shows that by the laws, rules, usages and practices of the Regular Baptist churches, a church may withdraw from an association without destroying its identity as such, and without disorganizing its self-existent government, yet there was not a particle of evidence to show that a part or faction of a church might do so.

Appellants' contention amounts to this: that the majority may rule over the minority with a high hand in violation of the laws, rules, usages, faith and practice upon which the church is founded, and on appeal by both parties to the association for its approval, advice and recognition, the majority receiving therefrom an unfavorable decision, may turn around, deny the power of the association to deal with the matter, go back home and oppress the minority by going through the form of excluding them from the church, withdraw from the association, organize a new one and join it; and thereupon claim the right to be heard to say in the civil courts that because the Danville As-

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sociation had no power to enforce its decision and decree, that the civil courts, therefore, are powerless to protect a title to property, dependent upon that ecclesiastical decision and decree. According to the code of morals which the civil law requires us to uphold in all cases, the majority are estopped from such a contention. If their contention were to prevail, the civil courts would find themselves recognizing one faction of a divided church as the true church, while the ecclesiastical courts of that denomination would be recognizing the other faction as the true church. In other words, appellants' contention requires us to hold that the faction of Mount Tabor Church known as the majority, is the true Mount Tabor Church, while the undisputed evidence shows that all the ecclesiastical courts of that denomination, outside of that faction itself, has recognized the other faction, the minority, as the only true Mount Tabor Church. Such a contention has never been upheld by the decision of any court of last resort that we have been able to find, either in America or England, and our duty forbids us to be first to set the example.

But suppose we treat the action of the association as purely advisory and not judicatory, still its action must have a controlling influence on the civil courts. The Supreme Court of the United States, in a case, in some of its aspects much like the present, said: "They claimed to be the Third Colored Baptist Church, and as such they were recognized by councils of Baptist churches, duly called, and by the Philadelphia Baptist Association, an ecclesiastical body with which the church was associated. That body, it is true, was not a judicatory. Its action was not conclusive of any rights. But the fact that the complainants, and those acting with them applied for recognition as the Third Colored Baptist Church, and that the associa-

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tion thus recognized them, is persuasive evidence that they were not seceders, and that their rights have not been forfeited." *Bouldin v. Alexander*, 15 Wall. 131.

The undisputed evidence shows that the form of church government in the different denominations of Baptists in the United States is substantially the same.

On the question of the weight to be given to the decision of the Danville Association, we find a very pertinent case, decided by the Supreme Court of Ohio. *Harrison v. Hoyle*, 24 O. St. 254. That court said: "According to the rules of the society, we think the question of succession in the Ohio Yearly Meeting was a proper subject for the consideration and judgment of other yearly meetings. And it is quite certain that both parties so understood the polity of the society at the time of the separation, as each submitted to the several other yearly meetings its claim for recognition as the only true and legitimate Ohio Yearly Meeting. The several meetings then in existence (save only Philadelphia, in which there was a divided sentiment) decided in favor of Binns and his associates, upon full consideration of all the facts involved in the controversy. Are these decisions entitled to consideration and weight in this case? * * The civil courts, in determining the question of legitimate succession, in cases where a separation has taken place in a voluntary religious society, will adopt its rules, and will enforce its polity in the spirit and to the effect for which it was designed. * * * Applying these principles to the facts of the case before us, we are of opinion that the decisions of the several yearly meetings of the society, in relation to the succession in the Ohio Yearly Meeting, are proper and legitimate evidence in the case, and are entitled to great weight as intelligent opinions and judgments

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upon the subject. And when considered in connection with the circumstances of the separation, and in view of the principles upon which the Ohio Yearly Meeting was organized, they satisfactorily show that the meeting over which Binns presided affiliated with the undoubted regular women's meeting, was and is the true 'Ohio Yearly Meeting of the Society of Friends,' within the terms and meaning of the grant, whereby the trust estate in controversy was created." This case was cited with approval by this court in *White Lick Quar. Mect. of Friends v. Same, supra*.

We therefore conclude that even though the Danville Association had nothing but advisory power in the matter, yet, as both parties submitted their claims to it, on their own statement and version of the controversy, seeking its recognition, the decision of the association is entitled to very great weight as to which faction is the real and true Mount Tabor Church, and while not conclusive upon the courts, its decision, composed as it was of delegates, called messengers, from the whole twenty-two churches composing the association, a majority of whom, in council, had decided the same way, would be a safer guide for the civil courts on questions of religious doctrine, discipline, faith, and practice, than any judgment we might form contrary thereto.

In a recent case, the Supreme Court of Iowa has decided almost every single point here involved, where the minority of a divided Baptist Church was held to be the true church. *Mount Zion Baptist Church, et al. v. Whitmore, et al.*, 83 Ia. 138. The point there involved, and the contentions were so similar to those in this case, that we are induced to quote from the very able opinion in that case. That court said: "The petition recited the substance of the foregoing [which was a

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narration of the church troubles and the calling of a council and its decision], and contains averments that the defendants, and those associated with them, have departed from the faith and practice of the Baptist church, and are using the church building and records for the benefit and promotion of doctrines and faith contrary to and in violation of the faith, covenants and practice of the Baptist denominations, to maintain which the church was organized and the buildings erected. The relief sought is, that the defendants be restrained from interfering with the plaintiff in the free use of the church buildings and property for their legitimate use as a place of worship, and teaching the doctrines of the denomination. The answer puts in issue the allegations of the petition. * * * * The council found the doctrine of 'entire sanctification,' as taught by Smith brothers, was 'not in harmony with the teachings of the Baptist denomination,' but 'subversive to the very end sought,' and 'destructive of the peace' of the churches. The correctness of this doctrine as a rule of faith and observance in the Baptist church was in dispute between the factions. It was not, as indicated by appellees' argument, a question of the truth or falsity of the doctrine on Scriptural authority, but was it in accord with, or subversive of, the covenants and practice of the Baptist church, with the limitations imposed by its articles of association. This was a purely theological question, and a council of theologians from that church was a proper tribunal to determine such a question, and was so recognized and agreed upon by the parties. It is, however, contended by the appellees that they are not bound by this finding of the council, and we notice their reasons, or at least some of them. Much stress is laid upon the fact that each Baptist society is an independent body, with no higher eccle-

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siastical authority for its control; that its form of government is congregational where a majority govern; and that it is within itself 'a little republic.' It should be borne in mind that it is the distinctive character of the Baptist church government that is relied upon to make it an exception, and free it from the generally expressed rule of law, by which a minority of an association may claim its property against a majority seeking to divert it from its legitimate use. A quotation from the appellees' argument will indicate clearly the objection to be met. It is said: 'Yes, we repeat again if this church or any other Baptist church desires to change its "articles of faith" or belief, it may do so, if a majority of its members concur therein. If it desires to change to a Mormon church it may do so, and no person or persons, no man or body of men, either civil or ecclesiastical, has any right to interfere. It owes no allegiance to any man, or body of men, except a majority of its own members. It has no creed except the Bible, and the right of its own members to interpret that according to the dictates of their own consciences. If a majority of the members of that church believe the Bible to teach a certain doctrine, then that is "Baptist doctrine," because that church has the right and the power to determine for itself what the Bible teaches, and no other church or churches has any right to interfere therein.' The Baptist as a denomination, have no creed. There is no such thing as a one Baptist church with a one Baptist creed or belief. All there is of "Baptist creed" consists in the right of each separate church to interpret the Scriptures for itself, and to say for itself what it believes the Scriptures to teach. There are as many "Baptist churches" as there are several societies or congregations. There are as many "Baptist denominations or creeds" as there are several societies or con-

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gregations which have given expression to their belief of what the Scriptures teach.' Afterwards follows the conclusion: 'We conclude, then, if there be a difference of opinion between the plaintiffs and defendants as to what the Bible teaches with reference to sanctification, and the defendants are in a majority and plaintiffs a minority, according to Baptist practice and usage, there is but one remedy, namely, "they may retire, and find a home in some other church; or, they may organize themselves into a new one."'" The court then goes on to say: "This exclusiveness of government within the strict lines of ecclesiastical authority may be conceded; but we are constrained to doubt that any writer, either upon ecclesiastical or civil law, where a controversy involved the right of a minority of an association to have its property devoted to the purpose for which it was given or granted, has laid down a rule so broad.

* * * We are not adjudicating the right of any person to a religious belief or practice, nor are we to determine the truth or falsity of the doctrine of 'sanctification,' or 'sinless perfection.' Upon authority so general as to be beyond question it is held that property given or set apart to a church or religious association, for its use in the enjoyment and promulgation of its adopted faith and teachings, is by said church or association held in trust for that purpose, and any member of the church or association, less than the whole, may not divert it therefrom. The following cases, more or less directly sustain the rule, and are but a few of the many bearing on the question: *Kniskern v. The Lutheran Churches*, 1 Sanf. Ch. 439; *Attorney-General v. Pearson*, 3 Mer. 353; *Baker v. Fales*, 16 Mass. 147; *Stebbins v. Jennings*, 10 Pick. 172; *Hale v. Everett*, 53 N.H. 9; *Lawyer v. Cipperly*, 7 Paige 281; *Baptist Church*

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v. *Witherell*, 3 Paige 296; *Harrison v. Hoyle*, 24 O. St. 254; *Field v. Field*, 9 Wend. 395, 401; *Miller v. Gable*, 10 Paige, 627, 2 Denio, 492; *M. E. Church v. Wood*, 5 Ohio, 284; *Happy v. Morton*, 33 Ill. 398; *Lawson v. Kolbenson*, 61 Ill. 407; *Dublin Case*, 38 N. H. 459; *Watson v. Jones*, 13 Wall. 679; *Fadness v. Braunborg*, 73 Wis. 257, 41 N. W. Rep. 84; *Presbyterian Church v. Congregational Society*, 23 Ia. 567; *Schnorr's Appeal*, 67 Pa. St. 138; *Roshi's Appeal*, 69 Pa. St. 462.

"The Mt. Zion Baptist Church came into possession and ownership of the property it now holds under a profession of faith and practice limited by the 'articles of faith and church covenants published in the minutes of the Des Moines Baptist Association, in the year 1848,' which we understand to accord with the teachings of the Baptist denomination. These articles of faith and church covenants, and the teachings with which they accord, are a limitation on the trust or use to which the property may be applied.

* * * * The council selected by the parties declared, in effect, the doctrines taught by the Smith brothers to be a deadly error, and destructive of the peace of the church. Treating this finding for the present as legitimate and true for the purpose of the case, and the situation is that property given and devoted to the promotion of the Baptist church is being used for its destruction. The appellees' contention because of their claims for the distinctive or independent character of the Baptist church, by which a majority may, without limitation, govern, would permit this result.

* * * * The error of appellees in their claim for the 'independency' of the majority in a Baptist church lies in a mistaken conception of what should be understood by 'government.' The power of the majority to govern is derivative, and the source of deriva-

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tion limits the power. The organization gave birth to the church, and a power to govern the church. The church is Baptist because of the faith and covenants that make it so. It is not the faith and covenants that need, or are to be governed, but the members in the enjoyment and fulfillment of the same. The power to govern the church gives no power to change the church or the faith and covenants that fix its character. The property of this church is the common property of all its members, and each has such an interest therein that he may insist that it shall be devoted to the religious faith for which it was given. * * But there is no delegation of authority to the majority to apply it to the advancement of a church of another faith * * * or by changing the faith of the majority of the members of the church. * * * If, perchance, a bare majority of some Baptist church should determine, on Scriptural authority, their right to a plurality of wives, and, against the protests of a minority, devote the property of the church to the advocacy and practice of such a doctrine, under the claim of appellees that the church 'owes no allegiance to any man or body of men, civil or ecclesiastical, except a majority of its members,' the only redress of the minority would be to retire from the church, and leave the property to the majority for such a purpose. Such a surrender of civil rights is without support on any principle of natural justice, and we believe without the sanction of any judicial tribunal."

This case is so nearly the exact case now in hearing, and the points in controversy so nearly the same in both, that it decides every material point contended for by appellees against them, and if it correctly declares the law, as we think it does, it is decisive of this case against appellees. It is true, it differs with this case in that the ecclesiastical decision there was by

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a council only, in which the appellees participated, whereas, here the appellees did not participate in either one of the councils that decided against them, though they were invited to do so. But they did participate, or asked recognition as the true church at the hands of the association, the same as the appellants did; and the association was a more extensive ecclesiastical body than the council, and though its powers were like the council, advisory only, they were more extensive. The same conclusion was reached in favor of a minority of a Baptist church of the same faith and order in the Supreme Court of Tennessee. *Nance v. Busby*, 18 S. W. Rep. 874. The following cases are closely in point. *Rottman v. Bartling* (Neb.), 35 N. W. Rep. 126; *Baker v. Ducker*, 79 Cal. 365. See also annotation in 33 L. R. A. 832.

The evidence shows that appellants and the majority were at one time since the division, in possession of the church building, claiming to be the true church, and that appellees, and the majority represented by them, afterward broke open the house by the use of a fence rail, and ever since have had exclusive possession. And ever since that, appellants, and the minority they represent, have kept up a separate organization and church services, claiming to be the true church, and have been ever since so treated and recognized by the Danville Association, while the majority have been disowned by that association. That their action did not take the minority out of Mount Tabor Church, and the action of the majority in excluding them did not have that effect, see *West Koshkonong Congregation v. Ottesen*, 80 Wis. 62, 49 N. W. Rep. 24.

We, therefore, conclude that the finding of the circuit court was contrary to law, for which error the motion for a new trial ought to have been sustained.

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For this error the judgment is reversed, with instruction to sustain the motion for a new trial.

OPINION ON PETITION FOR REHEARING.

MCCABE, J.—Appellees have presented what they call a petition for a rehearing. It is, however, not a petition, measured by the rule of this court, No. 37. It is but an elaborate printed brief or argument, of sixty-two closely printed pages. The rule requires a petition “setting forth the cause for which the judgment is supposed to be erroneous.” The same rule also requires a brief in support of the petition. We would be justified in disregarding the so-called petition, but the importance of the questions involved induces us to carefully reconsider the questions discussed in such brief.

The entire argument therein is confined to four propositions: 1. That the opinion is based on an incorrect statement of the facts established by the evidence, to the effect that the appellees, and those represented by them, had departed from the original faith upon which the church was founded; 2, that it was wholly immaterial if they had so departed, so long as they constituted a majority of the membership of the church; 3, that appellants could not recover because all their interest in the church property and the interest of those they represent had ceased by reason of their expulsion from the church before the suit was brought, and 4, that they could not recover even if all other questions of law and fact were decided in their favor, for the reason that appellants were not legally elected trustees, there being no vacancy in the office of trustees of said church, and those electing them not being members of the church

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by reason of such expulsion, and not being a majority of the church.

The leading case cited in support of the proposition, that the majority of a church divided into two conflicting bodies may hold the church property, though such majority have abandoned the religious faith on which it was founded, is *Watson v. Jones*, 13 Wall. (U. S.) 679. That was a case where the Third Walnut-street Presbyterian Church of Louisville, Kentucky, became divided into two conflicting bodies, each claiming to be the church, and each claiming the right to the control and possession of the church edifice and property. The case has no application here, because the division there did not arise out of any difference in religious faith or belief, nor was there any claim that either side had changed their religious belief from that on which the church was founded. But the division was solely on account of differences in political belief. One side adhered to the cause of the Union during the war of the rebellion, and the other side adhered to the cause of the rebellion.

Appellee's counsel quote most of the following passage in the opinion in that case in support of their contention: "The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members or by such local organization as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it in the hands of the church than it is for the use of that congregation as a religious society.

"In such a case where there is a schism which leads to a separation into distinct and conflicting bodies,

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the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to use the property. If there be within the congregation, officers in whom are vested the powers of such control, then those who adhere to the acknowledged organization by which the body is governed are entitled to the use of the property. The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they have changed in some respect their views of religious truth."

There was not only no case before the court of a church divided into two factions on account of one of them having abandoned the original faith on which it was founded, but the court was not speaking of such a case, nor a violation of a trust arising out of such a case, by the use of the house of worship by the departing majority. The existing religious opinions, the right of inquiry into which is denied in the opinion, has no reference to the original faith on which the

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church was founded, but has reference rather to the conflicting views of the two opposing bodies, as to Christian duty to adhere to the lawful government of the country in time of war or rebellion. There was no pretense that the original faith on which the church was founded, in that case, made any declaration on that subject.

There are many minor differences of opinion as to religious duty and practice among the members of the same denomination, and even of the same church upon which the confession or articles of faith are silent. For instance, the propriety of attending balls or dances, playing cards, washing each other's feet, maintaining musical instruments in public worship, and the like, which differences ordinarily furnish no ground for a charge of a desertion of faith. It was such differences that led to the separation of the Third or Walnut-street Church in Louisville, and it was that class of differences the court had in mind in the use of the language above quoted. That it was not intended to apply the language to all cases, is rendered clear by another passage in the opinion, which counsel do not quote and make no mention of. It reads thus: "In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine. A pious man, building and dedicating a house of worship to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity, and placing it under the control of a congregation which at the time holds the same belief, has a right to expect that the law will prevent that property from being

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used as a means of support and dissemination of the Unitarian doctrine, and a place of Unitarian worship. Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of church government. The protection which the law throws around the trust is the same. And though the task may be a delicate one and a difficult one, it will be the duty of the court, in such cases, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust." Therefore, that case not only does not lend any sanction to appellees' contention, but is against it.

The next case cited by appellees' counsel in support of the proposition in question, is *Keyser v. Stanisfer*, 6 Ohio 363. That also was a suit for possession of a church-house property by Keyser and others, a small faction of a Baptist church, who had separated themselves from the church about a matter that had nothing whatever to do with the original faith upon which the church was founded. And it was held, in accordance with the rule laid down in the last-mentioned case, that in such a division of a church the property, as in ordinary voluntary associations, is held at the will of the majority. The division, in the Ohio case, was caused by the church excluding Keyser on charges preferred against him in the course of discipline for misconduct. He afterwards got another member named Cox and some married women to join him to sue for the church edifice. The ground on which he and his associates claimed that they were the real church, was that sometime after Keyser had been excluded the church adopted new articles of

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faith or a creed, and abolished the old. But there is no pretense that the church had abandoned the original doctrine or faith upon which it was founded. The division arose entirely out of the exclusion of Keyser from the church in the course of discipline, and had no reference to any change or departure by the majority from the original faith on which the church had been founded.

The next case cited in support of the right of the majority to rule in matters of this kind, is *Shannon v. Frost*, 3 B. Mon. (Ky.) 253. Counsel complainingly remark that "this case was cited by appellees in their original brief. * * But no mention is made of it in the opinion rendered herein. It did not receive the cold respect of a passing glance." Counsel must speak from actual knowledge in making this charge. One of them happens to know that all his statements are true except that that case was in the original brief. Because he knows that that case was not cited in the original brief, but was cited on a separate piece of paper filed nearly a month after the original brief was filed. That paper contained nothing else but a citation of that case, and was filed on the same day the opinion was handed down, and after the case had been decided. Then the writer of the opinion pasted that paper fast to appellees' original brief. He knows it was too late then to give the case even the cold respect of a passing glance, after the cause in which it was cited had been decided. However, this court is not bound to cite and comment on all cases cited by counsel. Such citations may not be worthy of such notice.

But the case has not the slightest bearing on the question of the rights of the majority faction of a divided church, who have departed from the original faith on which the church was founded, as against

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a minority faction adhering to such faith. It would be very much in point if there had been a division of the church in that case on a difference of religious belief, but there was no such division in that case.

In that case, seven members of a Baptist church in Frankfort, Kentucky, were regularly excommunicated from the church, presumably for immoral conduct. The expelled members, associating themselves with some other persons professing the same religion, organized themselves into a separate community of professed Christians, elected trustees, which election was ratified by the county court of Franklin county.

Afterwards insisting on their right to enjoy to some extent the house of worship built for and still occupied by the original church, they took possession and made periodical use of it, without the consent and in defiance of the prohibition of the church.

To settle the controversy, the members of the original church sued to enjoin them. The defendants did not claim to own the church edifice, but claimed the right to use it a part of the time, under a statute of Kentucky. That statute provides for the election of trustees by religious societies, and among other things regulates the power and control by such trustees of the house of worship belonging to such church or society. It is also provided therein that in case of a division in any congregation or church from any other cause than immorality of its members, the trustees are not to prevent either of the parties so divided from using the house or houses of worship for the purposes of devotion a part of the time, proportioned to the number of each party.

It was under this provision that the defendants justified their attempted use of the house. There was no question of a difference of religious belief involved in the case between the two parties.

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The court of appeals held that the statute did not apply. The only other point decided was as to the legality of the election of the trustees by the plaintiffs after constituting themselves into a new society. That point we shall notice further on. The next case cited in support of the proposition in question is *Petty v. Tooker*, 21 N. Y. 267. That case does squarely hold that a religious society, incorporated under the act of the legislature of 1813, in the State of New York, had power, through its trustees, elected under that act, to change from a Congregational to a Presbyterian church, even over the protest of the minority of the members, and carry the church property with them. But that was owing to the peculiar provision of the statute mentioned, and the peculiar construction placed upon it by the court of appeals of that state.

Yet, at the same time, in cases of divided churches, incorporated under previous statutes of that state, it was held uniformly by its courts, in harmony with all authority elsewhere, that a majority could not carry or divert the church property to a contrary doctrine and faith against the objection of a minority of the membership of the church adhering to the original faith on which the church was founded. *Miller v. Gable*, 2 Den. (N. Y.) 492; *Kniskern v. The Lutheran Churches*, 1 Sanf. Chancery (N. Y.) 439.

But that statute has been since modified in a subsequent act of the legislature of that State. In *Isham v. Trustees, etc.*, 63 How. Pr. 465, it was said: "As the act of 1813 has been construed, the members of a religious corporation were under its provisions left at liberty to divert the church property from the dissemination of the views of the persons acquiring it to that of any other view, whether religious or secular, which might be sanctioned and adopted by a voting majority of the congregation. (*Robertson v. Bullions*, 1 Kernan,

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243; *Petty v. Tooker*, 21 N. Y. 267; *Burrell v. Associate Reformed Church*, 44 Barb. 282).

"This was an extreme construction of the terms in which the carefully guarded act of 1813 was enacted, and by chapter 79 of the Laws of 1875 the legislature undertook its correction, and for that purpose provided and declared that the trustees of a religious society, incorporated under the act of 1813, should administer its temporalities and hold its property and revenues for the benefit of the corporation, according to the discipline, rules, and usages of the denomination to which the corporation belongs. (Laws 1875, p. 79, section 4.)

"This enactment was preserved and in terms extended by chapter 176 of the laws of 1876. The plain purpose of these acts was to abrogate the rule which had grown out of the preceding construction given to the act of 1813, and to deprive the congregation, as well as the trustees of the society of the power afterwards to divert the church property from the promotion and dissemination of the religious views of the persons obtaining and acquiring it to the promulgation and maintenance of any different systems of religious belief. Instead of holding the property subject, simply, to the disposition of the voting majority of the congregation, the trustees were henceforward to hold and devote it to the uses and purposes of the denomination of Christians in which the society should be included that obtained and acquired it. * * * *

"It was manifestly unjust to allow persons becoming members of a religious society, formed for the purpose of inculcating particular views, by their subsequent votes, to appropriate the property they might have done nothing to acquire to the promotion of views of an entirely different character from those entertained by the persons through whose contributions the prop-

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erty may have been obtained. This was the practical abuse which the Laws of 1875-6 were designed in the future to prevent, and they are required to be so construed as to carry that policy into effect." To the same effect are *The Reformed Presbyterian Church v. Bowden*, 10 Abb. N. Cas. 1; *Same v. Same*, 14 Abb. N. Cas. 356; *Isham v. Fullager*, 14 Abb. N. Cas. 363; *Field v. Field*, 9 Wend. 395.

It thus appears that *Petty v. Tooker*, *supra*, so confidently relied on for a rehearing, is no longer the law or authority either in or out of the state of New York.

Counsel for appellees cite and quote from *Baptist Church v. Witherell*, 3 Paige (N. Y.) 296, without definitely stating what point it is designed by it to support, the following passage: "All questions relating to the faith and practice of the church and its members, belong to the church judicatories to which they have voluntarily subjected themselves." If it is meant by this to support the proposition that the majority departing from the faith can hold the property against the minority adhering thereto in a case of division, the answer is that that case was one where the church was incorporated under the act of 1813, and, like *Petty v. Tooker*, *supra*, was governed and controlled by that statute, and hence is no longer authority in the state of New York or elsewhere.

But, if it was intended to support the proposition that the action of the judicatories of the Regular Baptist Church are absolutely binding upon the courts, then it is against the appellees, because the undisputed evidence shows that three several judicatories of that denomination had decided that appellees had departed from the faith as expressed in the articles of faith adopted at the foundation of the church, though such decisions were only advisory.

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And now, having examined all the cases cited in support of the proposition that the majority of a divided church may repudiate the original faith and hold the property, and having shown that those cases lend no support to such proposition whatever, and that there is no authority to that effect anywhere, we proceed to examine the third proposition, namely, whether the appellants, and those represented by them, ceased to have any interest in the church property by their alleged expulsion from the church. The case last referred to, together with *Lawyer v. Cipperly*, 7 Paige (N. Y.) 281, are both referred to as authority that appellants were no longer members of the church, but those cases do not lend any support to the proposition nor to any proposition urged by counsel.

The contention amounts to this: the church, becoming divided into two factions on account of a difference in religious belief and faith, the majority being accused by a minority of departing from the original faith, they sit in judgment in their own case, pass solemn judgment in their favor that they, being a majority, and hence the church, had a right to change the faith, and hence are not guilty of the charge.

Appellees assume the position that the majority had the right to act as the judicatory for themselves, and pass solemn judgment upon their own acts and adjudge that they are not guilty of a departure from the faith. And they condemn and exclude the minority from the church, and thus seek to preclude the civil courts from inquiring into the charge against them. And now they coolly ask this court to adjudge that their action, while acting as judges in their own case, shall be conclusive, not only on the opposite party, but conclusive on the courts as well, that the majority had not departed from the faith, and that the minor-

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ity were out of the church and could not raise the question of departure, and are not and were not members of the Regular Baptist Church of Mount Tabor, when this litigation began. This, too, in the teeth of the decision of three of the church judicatories to the contrary. The language employed by the Supreme Court of Iowa, in the case of *Mt. Zion Baptist Church v. Whitmore*, 83 Ia. 138, 13 L. R. A. 198, referred to in the original opinion, is so much in point here that we appropriate it. "The minority lay at the door of the majority the charge of heresy. The majority says: 'We constitute the church. All power is vested in the church, and, hence in us. We determine that the charge is false.' This is the precise claim made by the appellees as to the power of a majority, and it is the precise action taken by the appellees as a majority in Mt. Zion Baptist Church, after which the council was called, the action of which it would now repudiate. * * *

"The position leads to this: Consider the majority of a particular Baptist church as guilty of the grossest violations of and the widest departure from the church covenants and faith. Being accused by the minority, the accused sit in judgment, which it declares in its own favor, and then pleads the judgment it declares, as conclusive of its innocence, because no other man or body of men has authority to interfere. However such a rule may serve in purely ecclesiastical relations, we unhesitatingly say the civil law will not adhere to it where the result is to divert trust property from its proper channel."

This position of appellees at once assumes the truth of the very proposition that is in dispute, namely, the claim that the majority faction is the real and true Mount Tabor Regular Baptist Church. Having assumed that as a fact, they seek to prove it by showing

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that such majority has excluded the minority from the church, and then argue that the appellants being such excluded minority cannot raise the question as to the title to the church property, elect trustees, or dispute the claim of the majority that they are the church, because appellees, being such excommunicated minority, are no longer members of the church, and have no interest in the question as to who constitutes the church, or who owns the church property.

The only thing that can rescue this claim from the charge of unmitigated assumption pure and simple, is the contention that a majority faction of a church divided into two conflicting bodies on account of differences as to the standard of faith is the real and true church. That contention, we have seen, has no foundation in law or authority. To permit such majority, under such groundless assumption, to exclude or excommunicate the minority, who still adhere to the original faith, and claim to be the church so as to affect property rights, would be a reproach to the law. It would be the law making the title to the property turn upon a mere trick. Such action is vastly different from the action of the church in excommunicating members before it had become divided into two conflicting bodies on account of such differences in religious belief. The minority that succeeded in the Iowa case, referred to above, had been excluded from the church by the majority because of their difference in religious belief from the majority, and yet, the claim of the minority that it constituted the real Mt. Zion Baptist Church was sustained by the Supreme Court of Iowa.

There were three churches in Wisconsin, the denominational name by which they were known was Koshkonong's Lutheran Congregations, in Dane and Jefferson counties. The three churches were served

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by one pastor. One was known by the name of the Eastern Church, another by the name of the Western Church, and the other by the name of the Liberty Prairie Church. The three churches in many things acted jointly in their business affairs. Each one of the congregations became divided on the doctrine of election. The different factions in each congregation became known as Missourians and anti-Missourians. In an action by one faction against the pastor, representing the other, for the possession of the church property, the question of the validity of the exclusion of one faction by the other being in the majority, became involved in the case, being the case of the *West Koshkonong Congregation v. Ottesen*, 80 Wis. 62, referred to in the original opinion, the court there said: "But it is here objected that, even if a corporation was created by these proceedings, it was simply a corporation of the anti-Missourian faction, and did not represent nor succeed to the rights of the pre-existing voluntary organization known as the 'Eastern Church,' in other words, that the anti-Missourian faction had not only seceded from but had been expelled from the Eastern Church, and consequently, could form no corporation which would include or become the legal successor of the voluntary organization known as the 'Eastern Church.' This objection demands careful consideration, because, if the anti-Missourians were not members of the Eastern Congregation, they could not give the notice required by section 1990, R. S., nor execute the certificate required by the following section, which must be executed by the members of the society. The question is, were the members of the anti-Missourian minority still members of the Eastern Church? It is undeniably true that they were members of that church up to the time of the troubles in 1885 or 1886. Have they lost their membership since

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that time? Now, if they have lost their membership, it must be in one of two ways—either by voluntary withdrawal or by expulsion. * * *

“We cannot entertain for a moment the idea that the action of the Missourian faction in the Eastern Church, in March, 1887, by which they attempted to declare the anti-Missourians as withdrawn or suspended from the church, has in fact affected the rights of the anti-Missourians in the least.” The same legal principle, under like circumstances, is distinctly recognized in *Nance v. Buby*, 91 Tenn., at page 303, 15 L. R. A. 801.

This is sufficient to dispose of all the cases counsel cite in support of the proposition, that civil courts are not authorized to determine whether the church judicatories decided right or wrong, and hence cannot, in this case, determine whether the minority was wrongfully or rightfully expelled from the church. They quote from *Shannon v. Frost*, *supra*, among others the following passage: “We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for, whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this Court. For every judicial purpose in this case, therefore, we must consider the persons who were expelled by a vote of the Church, as no longer members of that Church, or entitled to any rights or privileges incidental to or resulting from membership therein.” They cite as sustaining this proposition *Chase v. Cheney*, 58 Ill. 509; *The White Lick Quar. Meet. of Friends v. Same*, 89 Ind. 136; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, and *Bouldin v. Alexander*, 15 Wall. (U. S.) 131.

There is no question but that the proposition stated is thoroughly settled law. But it is equally true that

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in the case from which the proposition is quoted, there was no question made, and none arose or existed in the case, as to the authority of those that performed the act or adopted the resolution or order of expulsion. It was not denied that it was done by the church. There was no division of the church on account of differences in religious belief, and there was no division on any other account. Simply the church expelled seven members, and they, uniting with others, formed a new organization and claimed the right to use the church house a part of the time; contending that they had been wrongfully expelled, but did not deny that the church had expelled them. But here it is denied that the expulsion was by the church. We agree that no judicial inquiry can be made as to whether the act of the church in expelling members is right or wrong, fair or unfair, so long as such act is in harmony with the law of the church. Nor can any such inquiry be allowed as to whether the laws, usages, practice, or faith of the church are right or wrong. That belongs to the exclusive province of the church, to fix, order, and establish. And when the church acts within its sphere or province, such act or acts are universally held binding and conclusive, not only upon the members of the church, but also on the secular or civil courts, even where the rights of property are involved, and are dependent upon the action, rules or orders of the church.

But it must be the act of the church, and not the act of persons who are not the church. In this case it was not denied that the church had become divided into two conflicting bodies, the minority charging that the majority had departed from the standard of faith set up at the foundation of the church, and that both factions were claiming to be the church, and both acting accordingly when the expulsion took place.

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The evidence shows that each faction, thus claiming to be the church, expelled the other.

How absurd it is, then, to say, as counsel do in this case, that there can be no inquiry beyond the fact of expulsion, to determine whether appellants are still members of the church.

Appellees' proposition is that appellants are not members because they have been expelled by the church. It is not sufficient to make good this claim to prove the mere act of expulsion, because that only proves one part of the claim. The other part is that the act of expulsion was done by the church, not merely by persons claiming to be the church, but by those who were really and truly the church. If the evidence falls short of proving both parts of the claim, then the evidence does not prove the claim that appellants are not members of the church. It is conceded that they were members unless the church has expelled them. The evidence showing that there were two conflicting bodies, each made up of members of this church, and each claiming to be the only real and true Mount Tabor Regular Baptist Church, and each of such bodies having expelled all the members of the other from that church, as shown by the evidence, it inevitably follows that the court must judicially investigate the question which of the two conflicting bodies is the real and true church, before it can determine that anybody has been expelled therefrom and ceased to be a member or members thereof. When such investigation results in establishing that one of these bodies is the real church, that ends the whole controversy in this case, without any inquiry about expulsions; that is so because the expulsions occurred after the division. Appellants' counsel, with tireless ingenuity, put the cart before the horse by first attempting to show that appellants were expelled in

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order to reach a resting ground for the claim that appellees, and those represented by them, are the church. But no rational man can say that either of the expulsions mentioned has changed the relations of either body to the church, unless such expulsion was the act of the church.

It was quite unnecessary for appellees' counsel to resort to or rely on the act of expulsion, if their other oft-repeated claim was well founded, namely, that the majority of a church, divided on account of religious differences, is the church. It is conceded that the church was so divided, each of the two bodies claiming to be the only true and real Mount Tabor Regular Baptist Church. Both claims cannot be admitted, hence judicial investigation must inevitably be resorted to, to ascertain which is the true church, and expulsions, since the separation by either side, can throw no light upon that investigation. What is the touchstone that tests which of the conflicting claimants is the true Mount Tabor Regular Baptist Church? This court in *White Lick Quar. Meet., etc., v. Same*, 89 Ind. 136, *supra*, furnished an answer. It is there said: "The title to the property of a divided church is in that part of the organization which is acting in harmony with its own law; and the ecclesiastical laws, usages, customs, principles, and practices which were accepted and adopted by the church before the division took place, constitute the standard for determining which of the contesting parties is in the right. *Watson v. Jones*, *supra*; *McGinnis v. Watson*, 41 Pa. St. 9; *Winebrenner v. Colder*, 43 Pa. St. 244; *Schnorr's Appeal*, 67 Pa. St. 138, 5 Am. R. 415; *Roshi's Appeal*, 69 Pa. St. 462, 8 Am. R. 275."

And again, in *Lamb v. Cain*, 129 Ind. 510, this court further answered the question thus: "Where it is alleged, in a cause properly pending, that property

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thus dedicated is being diverted from the use intended by the donor, by teaching a doctrine different from that contemplated at the time the donation was made, however delicate and difficult it may be, it is the duty of the court to inquire whether the party accused of violating the trust is teaching a doctrine so far at variance with that intended as to defeat the objects of the trust, and if the charge is found true, to make such orders in the premises as will secure a faithful execution of the trust confided. *Watson v. Jones, supra*; *Miller v. Gable*, 2 Denio. 492; *Attorney-General, ex rel., v. Pearson*, 3 Mer. 353; *Watkins v. Wilcox*, 66 N. Y. 654; *Attorney-General, ex rel., v. Town of Dublin*, 38 N. H. 459; *Happy v. Morton*, 33 Ill. 398; *Fadness v. Braunborg*, 73 Wis. 257."

The rule, as stated by the Supreme Court of Illinois in *Ferraria v. Vasconcellos*, 31 Ill. 54, 55, and recognized by a great many decisions in courts of last resort in other states, is as follows: "As a matter of law, as I understand the decisions, the rule is that where a church is erected for the use of a particular denomination, or religious persuasion, a majority of the members of the church cannot abandon the tenets and doctrines of the denomination, and retain the right to the use of the property; but such secessionists forfeit all right to the property, even if but a single member adheres to the original faith of the church. This rule is founded in reason and justice, and is not departed from in this case. Church property is rarely paid for by those alone who there worship, and those who contribute to its purchase or erection are presumed to do so with reference to a particular form of worship or to promote the promulgation or teachings of particular doctrines or tenets of religion, which, in their estimation, tend most to the salvation of souls; and to pervert the

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property to another purpose is an injustice of the same character as the application of other trust property to purposes other than those designed by the donor. Hence it is, that those who adhere to the original tenets and doctrines for the promulgation of which a church has been erected, are the sole beneficiaries, designed by the donors; and those who depart from and abandon these tenets and doctrines cease to be beneficiaries, and forfeit all claim to the title and use of such property. These are the principles on which all these decisions are founded; and so long as we keep these principles distinctly in view, we can have no great difficulty in applying them to the facts of each particular case. * * * .”

The same rule was stated by the Supreme Court of Iowa, in *Mt. Zion Baptist Church v. Whitmore*, *supra*, as follows: “Upon authority so general as to be beyond question it is held, that property given or set apart to a church or religious association, for its use in the enjoyment and promulgation of its adopted faith and teachings, is by said church or association held in trust for that purpose, and any member of the church or association less than the whole, may not divert it therefrom.” Accordingly, it is said by Sharswood, J., speaking for the Supreme Court of Pennsylvania, in *Schnorr’s Appeal*, 67 Pa. St., cited in the original opinion, that: “In church organizations, those who adhere and submit to the regular order of the church * * * though a minority are the true congregation and corporation, if incorporated.” Chief Justice Shaw, speaking for the Supreme Court of Massachusetts in a similar case, *Stebbins v. Jennings*, 27 Mass., at page 181, said: “That an adhering minority of a local or territorial parish, and not a seceding majority, constitutes the church of such parish to all civil purposes, was

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fully settled in *Baker v. Fales*, 16 Mass. R. 503, and *Sandwich v. Tilden*, there cited." To the same effect is *Roshi's Appeal*, *supra*, and many other cases, too numerous to cite. Therefore, it follows that if the minority were acting in harmony with the ecclesiastical laws of the church, and were adhering to the faith, and the majority were not, the minority, in law, was the real and true Mount Tabor Regular Baptist Church.

One of the very cases relied upon by appellants' counsel, *Bouldin v. Alexander*, 15 Wall, 139, 140, the Supreme Court of the United States said: "It may be conceded, that we have no power to revise or question ordinary acts of church discipline, or excision from membership. We have only to do with the rights of property. As was said in *Shannon v. Frost*, we cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off. We must take the fact of excommunication as conclusive proof that the persons excised are not members. But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to excommunicate others."

It follows, as conclusively as that two and two make four, that appellants, and those acting with them, did not cease to be members of the church by the act of the majority in expelling them, if we were right in the original opinion in holding that such majority had departed from the chosen faith, declared in the articles of faith adopted at the foundation of the church, and were teaching doctrines contrary thereto, because the unbroken line of judicial authority everywhere, as we have seen, declares the law to be, in such case, that such majority was not the real and true

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Mount Tabor Regular Baptist Church, and could not expel anybody from it, but that the minority represented by the appellants, were that church, because they were acting, as we there held, in accordance with the law of the church in adhering to the faith, and teaching the doctrines expressed in such articles of faith.

This brings us in the natural order to the first proposition on which a rehearing is asked, namely, that our former conclusion that the evidence showed such departure from the faith by the appellees, and those represented by them, the majority, is based on an incorrect statement of the facts established by the evidence.

The conflicting doctrines held by the two bodies are known as the "means doctrine," held to by the majority, and the "anti-means doctrine," held to by the minority. The epitome of the two doctrines may be stated thus: The "anti-means doctrine" is a belief and faith that conversions of sinners to Christianity and the salvation of human souls is not and cannot be brought about or aided by any human means or effort whatever, but that the same must be and is wholly and entirely the work of the Lord. The "means doctrine" is a belief and faith in the exact opposite, that such conversions and salvation may be aided by the use of human means.

There is no controversy about the meaning of the two terms "means" and "anti-means," nor as to the conflicting beliefs as above expressed, but the strange charge is now made that the "anti-means" party are the ones that have departed from the faith, and that the "means doctrine" was the original doctrine of the church. And out of the vast volume of about 600 pages of evidence appellees' learned counsel are only

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able to point to these lines in evidence as establishing that fact in the testimony of Elder Shirley, to-wit: "It—Mount Tabor Church—has always been means since my knowledge of it. So far as I know of its church history it has been means since the beginning of its constitution."

Counsel say of this evidence, that: "On the other hand, the appellants did not introduce a single witness to contradict the testimony of Elder Shirley on that proposition, or prove that Mount Tabor Church was or ever had been anti-means in its doctrines or teachings, and not a single witness so testified. In the evidence of all the witnesses examined during the protracted trial of this case, there was not a word from any one of them to sustain the assumption on which this opinion is predicated, that the 'means' party had departed from the faith on which Mount Tabor Church was constituted." This sweeping and startling declaration is made in defiance of, and by ignoring the conclusive documentary and other evidence adduced. It treats the articles of faith put in evidence, as having no force, and it ignores the evidence of the solemn decisions of two councils of the churches, and the decision of the Danville Association, that the majority, or "means" party, had departed from the faith as expressed in the articles of faith, and that the "anti-means" party, the minority, were still adhering to that faith, and were the real and true and only Mount Tabor Regular Baptist Church. It is true, the decisions of these three ecclesiastical tribunals recognized judicatories of that church, were not conclusive on the parties according to the governmental polity of the church, but advisory only; but nevertheless, as was said by the Supreme Court of the United States in *Bouldin v. Alexander*, *supra*, such decisions "are persuasive evidence" of the facts thus decided.

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And here we notice, counsel urge that appellants relied hitherto on the theory that the decision of the Danville Association was conclusive evidence of such departure, and we, having decided that it was not conclusive, but advisory only, appellants, it is contended, must succeed on that theory or fail. The theory on which the appeal was sought to be maintained, is that the finding was contrary to law, in that it was contrary to the evidence. Appellants' contention that the decision of the Danville Association was conclusive evidence of the charge of departure, was not inconsistent with the specification in the motion for a new trial, that the finding was contrary to the law and the evidence in the case. It was not essential to that theory that the evidence, or one item of it, should be conclusive against appellees, but it was a sufficient maintenance thereof that the finding was contrary to the evidence, without showing that any particular item of it was conclusive of the fact it tended to prove.

Two of the articles of faith read thus: "Fourth—We believe in the election by grace, according as He has chosen us in Him before the foundation of the world, that we should be holy and without blame before Him, in love, having predestinated us to the adoption of children by Jesus Christ, to crown us according to the good pleasure of His will. Fifth—We believe that sinners are justified by the righteousness of God, which is in Christ Jesus imputed to them by Divine and supernatural operation of the spirit of God, and that they are kept by the power of God through unto salvation." In all this long controversy it has never been hinted by a single witness that this declaration of faith was consistent with the means doctrine, nor have counsel for appellees, in all their long and earnest argument, either on the original hearing or on this petition for rehearing, claimed that

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the decisions by the three several judicatories of the church had wrongly construed the articles of faith to be in conflict with the "means doctrine."

Nor is there a scintilla of evidence that there was ever but the one construction put upon this declaration of faith. What, then, was this long protracted hearing of evidence about, occupying about ten days, if the item of evidence we have quoted was uncontradicted? Why it was all, except that item, devoted to an effort on the part of appellees to prove that the majority in a church with a congregational form of government, as here, could change at pleasure their standard of faith. Hence it was that the discussion of the item of evidence in question in appellees' original brief occupied only two lines, and in the present brief of over sixty pages, only a little over a page is devoted to this item of evidence. The whole evidence proceeded on the theory of a conceded departure in faith by the majority and an attempted justification thereof on the ground that the majority had the right to change or alter the faith and doctrine of the church, unless the item of evidence in question can be construed as a denial of such departure by the majority. That theory still occupies all of appellees' elaborate brief except a page or two. But there is still another item of evidence of a very vital and controlling character that counsel ignore. And that is, that the church record, put in evidence, shows that when the church was organized it was named a "Regular Baptist Church," and its denominational name has never been changed.

No principle is better settled than that property conveyed to trustees for the use of a church by its denominational name, as was the case here, creates a trust, for the promulgation of the tenets and doctrines of that denomination. *Hale v. Everett*, 53 N. H. 9, s. c.

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16 Am. R. 118, 191; *Ferraria v. Vasconcelos*, *supra*; *Kniskern v. Lutheran Churches*, 1 Sanf. Ch. *supra*; *First Presbyterian Church v. Bowdin*, *supra*; *Miller v. Gable*, *supra*.

History records that one branch of the Baptist denomination is what is known as, and called Regular Baptists. History says that they are strongly Calvinistic in doctrine. American Church History, vol. 1, p. 19. A summary of their articles of faith, by the same history, is stated as follows: "Articles 1 and 2 state the doctrine of the Trinity, and accept the Scriptures of the Old and New Testament as the word of God and only 'rule of faith and practice;' Article 3 declares that 'God chose his people in Christ Jesus before the foundation of the world' and 'predestinated them unto the adoption of children;' Article 4, that man is a sinner and consequently in a lost condition; Article 5, that he has no power of his own free will and ability to recover himself from his fallen state; Article 6, that sinners are 'justified in the sight of God only by the righteousness of Jesus Christ;' Article 7, that the elect are 'called and regenerated by the Holy Spirit through the Gospel;' Article 8, that nothing can separate true believers from the love of God, and that they shall be kept by the power of God through faith unto salvation." American Church History, Vol. 1, p. 21, 1893.

This is Calvinistic doctrine, and corresponds exactly to the doctrine designated in the evidence as "anti-means" doctrine. Tyler's Ecclesiastical Law, sections 830, 831.

The doctrine designated in the evidence as the "means doctrine" corresponds exactly to what is known as Arminian doctrine. Tyler's Ecclesiastical Law, sections 830, 831.

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These two doctrines, in the light of historical facts, of which courts take notice, are recognized as in irreconcilable conflict in *Miller v. Gable*, *supra*.

But there is another item of vital and controlling evidence which counsel ignore. It is evidence which shows that appellees, and the majority acting with, and represented by them, construed the articles of faith and the denominational tenets of the Regular Baptist Church to be in conflict with the "means doctrine," just as the two councils and the association had. After a two years' struggle by the contending factions, seeking recognition and admission to the Danville Association, to which the church belonged, and each claiming that it was the only true Mount Tabor Regular Baptist Church, the majority party was disowned and refused admittance because of such departure from the faith, and the minority party received and recognized as the church; the majority party went home and organized a new association, and after grave deliberation, they named it "The Mount Tabor Means Baptist Association." Thus it will be seen that the denominational name of Regular Baptist was changed by dropping out the word regular, which distinguishes that denomination of Baptists in the United States from twelve or thirteen other denominations of Baptists. And in the place of the word "Regular" they substituted the word "means." American Church History, Vol. 1, p. 18. There is no such church known to history as Means Baptists.

If the church was and always had been a "means" church, if the denominational faith and belief was in the means doctrine, then the denominational name of "Regular Baptist" carried that idea with it, and there was no cause for changing it. As was said in *Hale v. Everett*, *supra*: "A society which should take for its name 'The First Society of Roman Catholics in C,' or

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‘The First Society of Presbyterians in C,’ or ‘The First Society of Quakers in C,’ would be understood as made up of persons of the sect which the name of the society indicated; and if a donation of a church had been made to certain persons * * * to be forever subject to the control of the First Society of Roman Catholics in C * * * the trust would have been held subject to the control of such of the society, and such only, as adhered to the fundamental doctrines of the society as indicated by the name, even though they might be a minority of those who at first were numbered among its members.”

By dropping out the very word, and the only word, from the denominational name that distinguished the denomination from twelve or thirteen other sects of Baptists, and substituting in its place the word “means,” about which the whole trouble had arisen, is an act that as plainly construes the articles of faith and the tenets of the denomination to be in conflict with the means doctrine, as any act could be on the part of the majority. If the means doctrine was taught in the articles of faith, if it belonged to the tenets of the denomination, the majority would have refused to the last to change the name.

This change was a frank confession, on the part of the majority, at a time, perhaps, when the uppermost thought in their minds was to express their belief that the denominational name “Regular Baptist Church” did not carry with it a correct expression of their religious faith and belief, and that the articles of faith did not do so. And the act of the minority in adhering to the old name is equally significant. Thus it is that the majority, represented by the appellees, have, by an unequivocal act, placed the same construction upon the articles of faith and the tenets of the denomination that the minority, the two councils and the as-

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sociation have in deciding that the means doctrine is a departure from the faith as expressed in the articles of faith.

And the civil courts accept the construction placed upon the ecclesiastical laws of an ecclesiastical body by such body as binding on the civil courts. *Lamb v. Cain, supra*; *White Lick, etc., v. White Lick, etc., supra*; *Mt. Zion Baptist Church v. Whitmore, supra*.

Here, both the conflicting bodies, as well as the ecclesiastical courts of the denomination, have so construed the articles of faith and the denominational tenets as to hold, impliedly at least, that the means doctrine is a departure therefrom. That construction is binding on this court.

The articles of faith being a solemn written compact, are conclusive on the question of faith.

If the item of testimony, quoted from Elder Shirley, was in conflict with the articles of faith thus construed, his testimony being oral only, it cannot be considered in opposition to the written compact. *Robinson v. Snyder*, 97 Ind. 56; *Oiler v. Rodkey*, 17 Ind. 600; *Symmes v. Brown*, 13 Ind. 318. But, aside from that, his testimony, when examined, may be harmonized with all the other evidence, which it is the duty of the court or jury to do, if that can be reasonably done.

He was speaking from his standpoint. He, and all the witnesses on that side, were testifying that the majority constituted the church. As the learned counsel have, in the brief on this petition, repeated nearly fifty times, that the majority is the church and the church is the majority. He said: "So far as I know of its church history, it has been means since the beginning in its constitution," that is, according to all the witnesses on that side, the majority is the church. Therefore, he means that the majority, so far

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as he knows, believes in the means doctrine. That fact was not denied. How it was at the constitution of the church he does not state. What did he know? He was speaking more than fifty years after the church was founded, and only spoke so far as he knew. He testified that he was but a boy in 1859, which was twenty-four years after the church was founded. He did not profess to know what the original faith was, on which the church was constituted. Such testimony, it has been held, affords no information as to what the original faith was on which the church was founded, and the faith at that time is the vital and turning point. *Kniskern v. Lutheran Churches, supra*; *Roshi's Appeal, supra*; so that there is really no conflict between the item of testimony in question and the articles of faith, and other evidence as to what the original faith of the church was; but if there was such conflict the solemn written compact must be held conclusive.

The fourth and last proposition made is, that appellants were not legally elected trustees by the minority, because there was no vacancy in such offices, and that a minority could not elect, and hence appellants could not maintain this suit. In *Schnorr's Appeal, supra*, Sharswood, J., speaking for the court, said: "The corporation or society are trustees, and can no more divert the property from the use to which it was originally dedicated, than any other trustee can. If they should undertake to divert the funds, equity will raise some other trustee to administer them and apply them according to the intention of the original donors or subscribers." That was a case where both factions, as here, had elected trustees. To the same effect are several of the cases cited in this and the original opinion.

But there is another, and perhaps a more conclusive

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reason why the legality of the election of the appellees in this case is not to be considered, and that is there was no issue under which the authority of the appellants as trustees to sue could be inquired into.

The complaint shows on its face that appellants sued in their capacity as trustees of Mount Tabor Regular Baptist Church.

The only answer to the complaint reads thus: "The defendants in the above case for answer say, that the said Albert Smith, Samuel Schenck and Thomas Shepherd are not the trustees of the Mount Tabor Regular Baptist Church, and were not at the time of the commencement of this action; that the defendants, Robert G. Pedigo, Preston Smith and Levi Shirley, are the trustees of said church and corporation, and were so at the time of the commencement of this suit, and the said defendants deny each and every allegation in said complaint contained. Wherefore they demand judgment for costs and all proper relief." This answer was verified. But it was a palpable attempt to defeat the merits by dilatory matter in abatement, that has nothing to do with the merits by commingling them together. They sought to try the merits under cover of matter in abatement; and failing in their defense on the merits, fall back on the matter in abatement, and insist, not on abating the suit, but on a finding and judgment in their favor on the merits. The common law would not permit this to be done, and for a long time our code was construed not to have changed the common law in this respect, but it was afterwards construed to have modified the common law so as to allow matter in abatement and in bar to be pleaded together in the same answer. But immediately thereafter the legislature enacted the following: "Pleadings denying the jurisdiction of the court, or in abatement of the action, and all dilatory pleadings, must

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be supported by affidavit. The character or capacity in which a party sues or is sued, and the authority by virtue of which he sues, shall require no proof on the trial of the cause, unless such character, capacity, or authority, be denied by a pleading under oath, or by an affidavit filed therewith. An answer in abatement must precede, and cannot be pleaded with an answer in bar, and the issue thereon must be tried first and separately. If the issue be found against the answer, the judgment must be that the party plead over, and against him for all costs of the action up to that time." R. S. 1894, section 368 (R. S. 1881, section 365).

It was held, before the enactment of this statute, that the authority of a party to sue could only be put in issue by a plea in abatement verified. *Nolte v. Libert, Admr.*, 34 Ind. 163. It has also been held by this court that at common law, as well as under this provision of the code, that matter in abatement must precede and cannot be pleaded with matter in bar. *Field v. Malone*, 102 Ind. 251; *Dwiggins v. Clark*, 94 Ind. 49; *Moore v. Harmon*, 142 Ind. 555.

It was frequently held, prior to the enactment of the revision of the code above quoted, that a plea in abatement, along with one in bar, is a waiver of the matter in abatement, and that such matter in abatement cannot be considered by the court. *Kenyon v. Williams*, 19 Ind. 44; *Jones v. Cincinnati, etc., Co.*, 14 Ind. 89; *Keller v. Miller*, 17 Ind. 206. And since that enactment the same rule was applied in *Field v. Malone, supra*, at pages 256-7, where this court said: "The appellee insists that the plea in abatement, having been filed with the general denial, and forming the second paragraph of the same answer, cannot be considered. * * * And this unquestionably was the rule under the common law, and is the rule under the present code."

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The answer here did not ask to abate the action, but asked judgment on the merits for the defendants. Therefore, under the statute and the previous decisions of this court, the matter in abatement was waived, thus making it wholly unnecessary to prove the character or capacity in which appellants sued.

Petition overruled.

DISSENTING OPINION.

HOWARD, J.—With the greater part of the original opinion in this case, as well as of the principal opinion on the petition for a rehearing, I fully concur. There can be no question that those who retain the original faith of a church or congregation are entitled to retain also the property acquired by or given to such church or congregation. Those who fall away from the original faith, whether the majority or the minority can have no right to take with them any of the property of the church. The property having been given to the church, or acquired by it, for the purpose of sustaining or spreading the belief taught by the church and the practice of its doctrine, it would be manifestly inequitable that members afterwards rejecting the faith should have any part in the property used in disseminating the same faith. I am of opinion, however, that there was evidence in this case quite sufficient to sustain the finding of the trial court, and, this being true, that we have no right to disturb the judgment so rendered. The evidence, as I read it, and even the original articles of faith and practice, and the code of rules adopted by the church on its organization, sustain the finding that Mount Tabor Regular Baptist Church taught from the beginning the faith now professed by the appellees, and hence, that it was a Means Church from its foundation. The decisions of the various councils, and of the Danville Association, are all con-

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fessedly but evidence of what was the original belief of the church. But, besides this evidence, there was ample evidence also, given by many learned teachers and doctors of the Baptist church, going to show that the Mount Tabor Church was always a means, and not an anti-means church; in other words, as its articles of belief and rules of decorum seem to show, that, while the church believed in election by grace and justification by the righteousness of God; yet it also believed that they that have done good shall rise to eternal life, and they that have done evil to eternal damnation; that is, that men may be brought to God by human means, God is making use of the instrumentality of man.

Much evidence was also given to show that, by the original constitution of this church, the form of government is that the majority vote is the voice of the church, even in articles of faith; that each church must put its own construction upon the Scriptures, and that this must be done by a majority vote. There is no appeal to any other authority. The local church is supreme. The record further shows that, as a matter of fact, the anti-means minority was not expelled for any belief or want of belief, but "for disorderly conduct in declaring an unfellowship for a portion of the members of Mount Tabor Church."

The evidence here referred to was believed by the trial court, who therefore found that the means majority were the true Mount Tabor Church, and rightfully entitled to the church property. I am at a loss, consequently, to know how we can, consistently with the rules of this court, disregard the finding so made, and reverse the judgment based upon it.

For the reasons here given, I must dissent from the conclusion reached by the majority of my brethren.

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DAVIS v. NISWONGER.

[No. 17,932. Filed June 18, 1896.]

PARTNERSHIP.—*Action for Dissolution.*—*Sale of Mortgaged Property Under Foreclosure.*—A foreclosure sale of all the property of a partnership effects its dissolution; and an action cannot thereafter be maintained for dissolution.

RECEIVER.—*Partnership Property.*—*Sale on Foreclosure.*—Where partnership property is sold on foreclosure, to the mortgagee, on an agreement that, upon sale of the property by such mortgagee, the residue above the mortgage debt should belong to the partners, and afterward the mortgagee sells the property to one of the partners, a receiver cannot be appointed, even though the partner who buys the property should realize thereon more than the amount of the mortgage debt.

From the Madison Circuit Court. *Reversed.*

Goodykoontz & Ballard, Henry, McMahan & Van Osdol, for appellant.

Chipman, Keltner & Hendee, for appellee.

MCCABE, J.—The appellee sued the appellant, alleging that they were partners seeking an accounting and a dissolution of the partnership, the appointment of a receiver and a judgment against the defendant. The issues formed were tried by the court, resulting in a general finding for the plaintiff, and a judgment against the defendant for \$561.83, and the dissolution of the partnership, over appellant's motion for a new trial.

The appellant assigns for error the action of the circuit court in overruling his demurrer to the complaint for want of sufficient facts, and in overruling his motion for a new trial.

The substance of the complaint is, that the plaintiff and defendant entered into a partnership on the 27th

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day of May, 1892, in the hardware and undertaking business, in the town of Frankton, Madison county, Indiana; that afterwards, on November 10, 1893, the partners executed a chattel mortgage to Pogue, Miller & Co., of Richmond, Indiana, which was afterwards foreclosed, and the property sold under decree of foreclosure to Pogue, Miller & Co., under an agreement between the parties to said mortgage that said Pogue, Miller & Co. was to hold the same in trust for the plaintiff and defendant herein, and upon any sale thereof, thereafter to be made by Pogue, Miller & Co., that the residue realized over and above the mortgage debt of Pogue, Miller & Co., amounting to \$2,700.00, should be held by Pogue, Miller & Co. for the plaintiff and defendant herein; that said sale included stock of goods, which was then of the value of \$3,425.00, and the book accounts and notes to the amount and value of \$2,000.00; that said Pogue, Miller & Co. afterwards transferred said stock of goods and book accounts and notes to Benjamin F. Davis and wife, Nancy Davis. That afterwards said Davis sold said stock to Wise & Son, and retained in his possession the notes and accounts, amounting to \$2,000.00, and the balance of the purchase-money, over and above the claim of Pogue, Miller & Co., which left in his hands \$700.00, realized from the sale of the stock and accounts, making \$2,700.00, which said Davis still holds of the assets of said firm. That said firm has done no business since the sale of its property on foreclosure of said chattel mortgage. That said Davis denies this plaintiff's right of access to the book accounts, notes and money belonging to said firm, and has failed and refused to pay any of the debts of said firm. That said partnership owes debts to the amount of \$3,564.00, to the payment of which said funds and property in the hands of said Davis and wife should be applied, and

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the residue should be divided equally between said Davis and the plaintiff, who were equal partners. That Davis is insolvent.

Prayer for an accounting, dissolution of the partnership, and the appointment of a receiver, and a judgment in plaintiff's favor against the defendant for one-half the value of the property received and converted by him. The judgment is only for the recovery of money, as before stated, and a dissolution of the partnership.

The appellee's counsel, in defense of the ruling upholding the sufficiency of the facts stated in the complaint, says that it is "many-barreled," and hence it is urged if it is not sufficient for one purpose, that it certainly is for another.

But our system of procedure knows nothing of a "many - barreled," or double - barreled complaint, especially where it is, as here, in a single paragraph. Evidently counsel mean, if the complaint is not good on one theory, it may be on another. That is, if it is not good as a complaint for an accounting and judgment in favor of the plaintiff, they claim it is good as a complaint for the dissolution of the partnership and the appointment of a receiver.

However, we find it wholly unnecessary to determine what the theory of the complaint is.

It is fairly to be implied from the complaint, that the entire partnership effects were mortgaged and sold on foreclosure sale to Pogue, Miller & Co., because, among other things authorizing such an inference stated in the complaint, it is averred therein, "That said firm has done no business since the sale of its property on foreclosure of said chattel mortgage."

The sale of all the property of a partnership, the operation or the dealing in, or with reference to which

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constituted its sole business, effects its dissolution, as also its total destruction, may be presumed. 17 Am. and Eng. Ency. of Laws, 1100, 1101, and authorities there cited. Parson on Partnership (3d ed.), Star pp. 385, 470.

Indeed, the appellee's counsel concede, in their brief, that the complaint shows "that there was a practical dissolution of the firm."

That being true, there was no necessity, and consequently no right, to invoke the power of the court to do that which had already been done. So the complaint cannot be sustained on that theory. We proceeded to inquire whether it shows a right to the appointment of a receiver.

Such relief could only be awarded by showing the existence of property in which the parties both had an interest. The complaint failed to show that fact.

It shows that Pogue, Miller & Co. purchased the mortgaged property at foreclosure sale, "under an agreement between the parties to said mortgage that * * * upon any sale thereafter made by Pogue, Miller & Co., that the residue realized over and above the mortgage debt of Pogue, Miller & Co., which amounted to about * * \$2,700.00, should be held by Pogue, Miller & Co. for the plaintiff and defendant herein."

The title of the property is shown by the complaint to have passed to Pogue, Miller & Co. absolutely, with a stipulation that if they sold it for a sum in excess of their debt, that excess was to belong to the plaintiff and defendant in this case. The complaint shows that Pogue, Miller & Co. transferred their title to the defendant Davis, but for what consideration or for how much is not stated. For aught that appears it might have been for much less than \$2,700.00, the amount of their debt. In that event, the member of the former

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firm, composed of appellant and appellee, would have no interest in the proceeds of such sale.

The complaint shows that "Davis sold the stock to Wise & Son, and retained possession of the notes and accounts and the balance of the purchase-money over and above the claim of Pogue, Miller & Co., which left in his hands * * * \$700.00, realized from the sale of the stock and accounts of the value of * * \$2,000.00, which said Davis still holds of the assets of said firm."

We construe this language to mean that Davis realized from his sale of the stock to Wise & Son \$700.00 over and above the amount of the mortgage debt due to Pogue, Miller & Co., and that said Davis held that and the notes and accounts, valued at \$2,000.00, making in all \$2,700.00, in which the appellee claimed he was entitled to share.

But it was the amount for which Pogue, Miller & Co. should afterwards sell the partnership effects of appellant and appellee that was to be the criterion to determine whether they had any interest in the proceeds of such sale; and it was in the proceeds of that sale that they were to have a contingent interest, and not in any other. There is no agreement stated in the complaint that they were to have an interest in the proceeds of any sale of said effects by the vendee of Pogue, Miller & Co. There is no showing in the complaint that the amount Davis agreed to pay Pogue, Miller & Co. for the effects was more than their debt. It may have been less. In that event, neither Davis nor Niswonger had any interest in the proceeds of that sale. While Davis had an interest in the proceeds of the sale to Wise & Son, because he is shown by the complaint to be the absolute owner of the property sold, yet Niswonger had no interest in it, because he had no interest in the property sold.

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Neither did Niswonger have any interest in the notes and book accounts of the former firm, because the absolute title thereto is shown by the complaint to have passed to Pogue, Miller & Co., by their purchase at foreclosure sale, which title they transferred, as shown in the complaint, to appellant Davis. Therefore, there was no cause shown for the appointment of a receiver.

For the same reason there was no right shown to a personal judgment against Davis in favor of Niswonger. For these reasons, we are of opinion that the complaint did not state facts sufficient to constitute a cause of action.

The judgment is reversed, with instructions to sustain the demurrer to the complaint.

MYERS v. THE CITY OF JEFFERSONVILLE ET AL.

[No. 17,989. Filed June 18, 1896.]

MUNICIPAL CORPORATIONS.—Refunding Bonds.—Statute Construed.

—Under act of March 3, 1877, authorizing the funding of city indebtedness, funding bonds which have passed into the hands of innocent and good-faith purchasers, are not subject to defense by the city, and, as a *bona fide* indebtedness, are subject to be refunded.

SAME.—Constitutional Amendment.—Municipal Indebtedness.—The constitutional amendment of March 14, 1881 (section 220, Burns' R. S., 1894), limiting the amount of indebtedness to be incurred by municipalities to two per cent. of the taxable property, does not render invalid prior indebtedness exceeding that limit, nor deny the right of a city so indebted to refund such debt by the issue of new bonds.

SAME.—Courthouse.—County Seat Removal.—Injunction.—Money borrowed by a city to defray the expense of litigation, involving the removal of a county seat, and the cost of a lot and the building of a courthouse and jail for a county, is unauthorized; and bonds issued to secure the money so borrowed have not such validity in the hands of any holder as to preclude a citizen and taxpayer from the right of injunction to prevent the refunding of such bonds.

145	431
152	208
152	209
152	213
152	214
152	223
152	225
145	431
162	178

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From the Clarke Circuit Court. *Reversed.*

M. Z. Stannard, for appellant.

L. A. Douglass, for appellees.

HACKNEY, J.—The appellant sought to enjoin the city of Jeffersonville and the officers thereof from executing certain bonds of said city. The questions presented by the record arise upon a special finding and conclusions of law rendered by the trial court.

By the facts specially found, it appears that the appellees were attempting to refund the indebtedness of the city at a lower rate of interest than that provided in the bonds of said city, already outstanding and representing said indebtedness. The facts found, further disclose that while said indebtedness exceeds the limit of "two per centum of the value of the taxable property within such corporation," as such limit is prescribed by the amendment to the State constitution, adopted March 14, 1881, R. S. 1894, section 220, all of said indebtedness was created prior to March 14, 1881.

The refunding bonds were authorized by ordinances, and were divided into three distinct series, the last of which consisted of \$87,000.00, and were to take the place of bonds found to have been issued as representing an indebtedness of said city, in a like sum, "the larger part of which * * was incurred in purchasing the necessary ground therefor and building a courthouse and jail for the county of Clarke, and in paying the cost and expense of conducting a county seat contest, brought to change the location of the county seat from the town of Charleston, in said county of Clarke, to the city of Jeffersonville, in said county."

The court found, as conclusions of law, that said several series of bonds were valid, and refused to enjoin the appellees from negotiating them.

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It is here objected that none of the indebtedness proposed to be refunded was found to have been valid, and that it affirmatively appears, from the facts found, that said \$87,000.00 indebtedness was not valid because of the absence of authority in the city to create the same for the purposes found.

As to the indebtedness, other than the \$87,000.00, it appears to have been incurred for the erection of a schoolhouse, for defraying the running expenses of the city, and the cost of repairs of streets and alleys, and other public improvements of said city. We are not advised as to any valid objection to this class of indebtedness. All of it was refunded, as found by the court, after the act of March 3, 1877 (Acts 1877, p. 17), authorizing the funding of any indebtedness of such city, and providing that after the funding "bonds shall have been negotiated, no action or proceeding shall be instituted, nor any defense to any action interposed, by said city, or by any person or persons, the object of which shall be to impair the validity or security or depress the value of said bonds."

The bonds issued, therefore, in funding that part of the city's indebtedness, having passed into the hands of innocent and good-faith purchasers, as the court found, would not be subject to defense by the city and must stand, under the provisions of said act, as a *bona fide* indebtedness and subject to be refunded.

In 2 Beach. on Pub. Corp., section 929, it is said: "The municipality, by the issue of new bonds, waives any defenses it may have to the old bonds. By the new issue it obtains an advantage in postponing the time of payment, and generally in the rate of interest; and after the holders of the original issue have surrendered their evidence, the town will not be permitted to set up old irregularities as defenses which the creditor

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had the right to assume were waived when it made him the new offer. The municipality must do equity. So careful have the courts been to protect the interest of holders of renewal bonds, that where an old issue had been held invalid and the municipality could not ordinarily issue new bonds in renewal, yet where it was specially authorized to issue new bonds in payment of its indebtedness, the holders of the original bonds were deemed creditors and were entitled to new bonds." *Town of Solon v. Williamsburgh, etc., Bank*, 114 N. Y. 122; *Hills v. Peekskill, etc., Bank*, 101 N. Y. 490.

This doctrine is unnecessary to the authority to issue renewal bonds, but it supports the presumption we have indulged in favor of the validity of the indebtedness upon which the original bonds issued. Besides, the burden of the issue as to the validity of such indebtedness, rested upon the appellant, and, as well said by counsel for the appellants, "Where a special finding is silent upon the issue or any question of fact, such issue or fact is regarded as found against the party having the burden of the issue."

That the entire indebtedness, or any part thereof, was invalid for the one reason that it exceeded the two per cent. limit, as prescribed by the constitution after the indebtedness was incurred, cannot be maintained. *Powell v. City of Madison*, 107 Ind. 106; *Scott v. City of Davenport*, 34 Ia. 208.

The constitutional amendment was designed to operate prospectively, and would, therefore, not render invalid a prior indebtedness, nor deny the right of a city so indebted to refund such debt by the issue of new bonds after the adoption of such amendment.

As to the outstanding \$87,000.00 of bonds, counsel for the appellees cite us to no express authority from the legislature, for the issue of bonds for the purpose

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of defraying the expense of litigation incident to the removal of a county seat, and the cost of a lot and a courthouse and jail for a county, made necessary by such removal. Nor have we been able to find any such express authority. Counsel for appellees suggest the well recognized rule that incidental or implied power exists for the purpose of carrying into operation such powers as are expressly given. It is not shown, or attempted to be shown, however, out of what express power the incidental power arises to authorize the incurrence of the debt, evidenced by the last mentioned bonds. We know of no express power given to cities, the execution of which would render necessary the borrowing of money for the purpose there found. There is a recital, in the ordinance looking to the refunding of said bonds, that "the proceeds thereof were used for the purpose of paying off notes and obligations of said city, which indebtedness was incurred by the expenditure for public improvements in said city." The ordinance containing this recital is found, at full length, in the special finding, and neither said ordinance nor said recital can be considered as a finding of fact with reference to the expenditure of said moneys, or the purpose for which they were borrowed. The ordinance is evidentiary, and it constitutes no finding of fact. The recital therein is neither the finding of a fact nor evidence of the facts. Furthermore, the express finding of facts by the court is contrary to the recital, unless it may be said that the "public improvements in said city," were in the erection of a courthouse and jail and the purchase of a lot therefor for Clarke county. Construing the finding, therefore, as establishing the fact that the \$87,000.00, for which said bonds were issued, were borrowed and expended for and in the removal of said county seat, the purchase of a lot for and the erection thereon of a court-

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house and jail for the county of Clarke, we conclude that such indebtedness was not valid.

It is argued, by the learned counsel for the appellee, that the bonds of a city, "regularly issued and delivered in the hands of a *bona fide* holder, for a valuable consideration, without notice, must be regarded as public securities, and placed on the same footing as bills of exchange," citing *City of Aurora v. West*, 22 Ind. 88 (85 Am. Dec. 413); *City of Mount Vernon v. Hovey*, 52 Ind. 563; *City of Madison v. Smith*, 83 Ind. 502; *Wilkinson v. City of Peru*, 61 Ind. 1; *City of Bloomington v. Smith*, 123 Ind. 41 (18 Am. St. Rep. 310).

The only further defense made of said bonds is, that "Any citizen and taxpayer may enjoin the illegal issue of bonds; but he cannot enjoin their payment after they are issued, unless the city could successfully maintain a defense on the same ground upon which the injunction is applied for as against the then holder," citing *City of Madison v. Smith*, *supra*; *Wilkinson v. City of Peru*, *supra*, and *City of Mount Vernon v. Hovey*, *supra*. It is then said that "These bonds are now in the hands of *bona fide* holders for valuable consideration, and negotiated to them without notice, and under such circumstances, appellant cannot, and does not, occupy the situation of a taxpayer who is attempting to enjoin an illegal issue of bonds before they are negotiated."

Accepting the propositions, and the force of the authorities as stated, they do not meet the question of an illegal or unauthorized issue of bonds. Here the question is as to the right of a taxpayer to object to the refunding of an indebtedness created without any authority of law, and it remains to inquire as to whether, under the circumstances found by the court, the holders of the bonds may be regarded as holders without notice of the absence of any authority to execute them;

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and whether the city might not defend against the bonds for the very reason that the appellant seeks to enjoin the refunding thereof.

Not a single authority has fallen under our observation to the effect that the city is estopped by the issue of illegal and unauthorized bonds, or that one may become such *bona fide* holder of bonds of that character that the city or a taxpayer may not deny their validity.

In Beach. on Pub. Corp., Vol. 2, section 936, it is said: "An entire want of power to issue the bonds renders them invalid even in the hands of a *bona fide* holder. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence," citing *St. Joseph Township v. Rogers*, 16 Wall. 644; *Merchants' Bank v. Bergen County*, 115 U. S. 384; 15 Am. and Eng. Ency. of Law, 1291; *Township of Washington v. Coler*, 2 U. S. Cir. Ct. App. 272, 51 Fed. Rep. 362.

In the Am. and Eng. Ency. of Law cited, it is said: "Want of power to issue the securities is the only defense which can be set up against a *bona fide* holder for value before maturity, without notice either actual or constructive. 'Bonds payable to bearer, issued by a municipal corporation * * if issued in pursuance of a power conferred by the legislature, are valid commercial instruments, but if issued by such a corporation which possesses no power from the legislature, they are invalid, even in the hands of innocent holders,'" citing *St. Joseph Township v. Rogers*, *supra*; *Black v. Cohen*, 52 Ga. 621; *Oubre v. Donaldsville*, 33 La. Ann. 386; *Slate v. Montgomery*, 74 Ala. 226; *City of Mount Vernon v. Hovey*, *supra*. *The Board, etc., v. Brown*, 28 Ind. 161, is cited also, but as opposed to the text above quoted. On the contrary, we think that

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case supports the text. It holds that an order for the expenditure of money, made by a county board, without authority of law, is void, and that bonds of the county in the hands of *bona fide* holders are subject to any defense available against the parties to whom they were issued.

It is further said, in the Am. and Eng. Ency. of Law, *supra*, that "There can be no estoppel in favor of *bona fide* holders where there is an entire absence of power," citing many authorities.

In *Hayes v. Holly Springs*, 114 U. S. 120, it was said: "Even a *bona fide* holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond. Recitals on the face of the bond or acts *in pais*, operating by way of estoppel, may cure irregularities in the execution of a statutory power, but they cannot create it. If, as in the present case, legislative authority was wanting, the bond has no validity." To the same effect are *Williamson v. City of Keokuk*, 44 Ia. 88; *Bissell v. City of Kankakee*, 64 Ill. 249 (16 Am. Rep. 554); *Livingston County v. Weider*, 64 Ill. 427; *Town of Big Grove v. Wells*, 65 Ill. 263; Reed on Corp. Finance, Vol. 2, section 409; *Young v. Board, etc.*, 55 N. W. Rep. 1112. See also *City of Lafayette v. Cox*, 5 Ind. 38; *Harney v. Indianapolis, etc., R. R. Co.*, 32 Ind. 244; Dillon's Municipal Corp. (4th ed.), sections 163, 164, 518, 542, 545, 546.

The result of the authorities is, we think, that where municipal bonds have passed into the hands of *bona fide* holders, that is: holders for value without notice of mere irregularities in the exercise of existing power to execute the bonds, they hold them as other commercial paper, and subject to no defense by reason of such irregularities. But where there is an absence of power to execute the bonds they are void and subject to defense in the hands of whomsoever they may come.

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It may be well to say that we pass upon the question before us without attempting to anticipate the claims of those who may hold the bonds in question, and with no purpose to establish a rule applicable to other facts than those here presented, and as we construe them.

Money borrowed by a city to defray the expense of litigation involving the removal of a county seat and the cost of a lot and the building of a courthouse and a jail for a county, we hold to be unauthorized, and bonds issued to secure the money so borrowed have not such validity in the hands of any holder as to preclude a citizen and taxpayer from the right of injunction to prevent the refunding of such bonds.

The judgment of the circuit court is reversed, with instructions to restate its conclusions of law in accordance with this opinion.

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[No. 17,742. Filed June 19, 1896.]

CONSTITUTIONAL LAW.—*When a Party May Question the Validity of a Law.*—A party will not be heard by a court to question the validity of a law, or any part thereof, unless he shows that some right of his is impaired or prejudiced thereby. *p. 450.*

SAME.—*Unjust or Oppressive Statute.*—A court cannot declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of a citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed, or protected by the constitution. *p. 450.*

SAME.—*Statute.—Presumption in Favor of Validity.*—All presumptions must be indulged in favor of a statute, and it is only when made to appear clearly and plainly that a statute violates some provision of the constitution, that it should be declared void. *p. 451.*

SAME.—*Invalidity of One Section May Not Invalidate Entire Act.*—When the different sections of an act are independent of each other, the invalidity of some of the sections would not necessarily invalidate the entire act. *p. 452.*

SAME.—*Statute.—Amendment by Implication.*—Where an act does not, either by its title or its terms, expressly profess to be amenda-

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tory of any statute, but has a bearing on a prior statute, which may result in amending such prior statute by implication, it is not in violation of Art. 4, section 21, of the constitution prohibiting amendments to statutes by mere reference to title. *p. 452.*

SAME.—Continued Practice of Legislature.—Interpretation of Constitution.—The continued and repeated practice of the legislature, unquestioned for a period of forty years, becomes a potent factor in the interpretation of the constitution; so much so that the court will be controlled by it when in doubt. *p. 457.*

SAME.—Constitution.—Subject-matter and Title of Act.—In Art. 4, section 19, of the constitution, providing that "every act shall embrace but one subject, and matters properly connected therewith," the word "subject" indicates the thing about which the legislation is had, and the word "matters" the things which are secondary, subordinate, or incidental. *p. 458.*

SAME.—Statutes Relating to Same Subject-matter Construed Together.—When a number of statutes, no matter when passed, relate to the same thing, or a general subject-matter, they are to be construed together and are *in pari materia*. *p. 460.*

SAME.—Construction of Statute.—Whenever a statute can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, such construction will be adopted by the courts. *p. 461.*

POLICE POWER.—When a Legislative, and When a Judicial Question.—It is the province of the legislature to decide when the exigency exists for the exercise of the police power of the State, but as to what are the subjects which come within it, is a judicial question. *p. 451.*

INTOXICATING LIQUORS.—Nicholson Law.—Subject-matter and Title of Act.—Constitutional Law.—The subject of the Act of March 12, 1895, known as the "Nicholson Law," as expressed in its title is "The better regulation and restriction of the sale of intoxicating liquors;" and the matters connected therewith, are the provisions providing for its enforcement and penalties for its violation, for a remonstrance against the granting of license, and conferring jurisdiction upon the courts in event of its violation; all of which are germane to the subject and not in controvention of Art. 4, section 19, of the constitution. *p. 459.*

SAME.—Acts of 1895, and of 1875, Construed Together.—Other Business in Room Where Liquors are Sold.—The proviso in section 2, Act of March 11, 1895, giving the board of county commissioners power to grant or refuse permission to carry on other business in the same room where intoxicating liquors are sold, when construed with sections 3 and 4, Act of March 17, 1875, which makes the granting of such permission depend on the personal fitness of such

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applicant, is not open to the objection that it confers absolute and arbitrary power upon the commissioners; and does not, therefore, invalidate the law. *p. 463.*

SAME.—Closing of Saloon at Time When Sale is Forbidden.—It is within the power of the legislature to require a saloonkeeper to securely close his saloon and permit no one to enter during the time when the sale of liquors is forbidden. *p. 466.*

SAME.—Persons in Saloon at Prohibited Hours.—Prima Facie Evidence.—Statute Construed.—Section 3, Act of March 11, 1895, making the fact that persons are permitted to go in and out of a saloon on days or hours when the sale of liquor is prohibited, *prima facie* evidence of guilt upon trial of a cause charging the saloonkeeper with violation of the law in the sale of liquor at such prohibited times, is valid. *p. 466.*

SAME.—License Not a Contract.—A license to engage in the liquor traffic is not a contract or grant, but a mere permit, and the applicant who receives it does so with the knowledge that it is at all times within the control of the legislature. *p. 467.*

SAME.—Violation of Statute May be Without Violating Every Provision.—Constitutional Law.—Under the general provision "For a violation of this or either of the foregoing sections of this act, the defendant shall be fined," etc., it is not necessary that all the provisions of a section be violated in order to make one liable to a fine. *p. 467.*

SAME.—License.—Remonstrance.—County Commissioners.—Constitutional Law.—Section 9, Act of March 11, 1895, providing that, if three days before any regular session of the board of commissioners of any county, a remonstrance in writing signed by a majority of the legal voters of any township, or ward in any city situated in the county, shall be filed against the granting of a license to any applicant for the sale of intoxicating liquors, it shall be unlawful to grant such license for a period of two years, etc., is not unconstitutional as delegating legislative power to the people to suspend the general license law. *p. 468.*

SAME.—License.—Remonstrance.—When Remonstrator May Not Withdraw His Name.—Under section 9, Act of March 11, 1895, providing that, if three days before the regular session of the board of county commissioners, a majority of the legal voters shall sign and file a remonstrance, the license shall not be granted, a withdrawal of one's name from a remonstrance can not be made after the beginning of the third day before such meeting. *p. 473.*

SAME.—License.—Remonstrance.—General Remonstrance Not Sufficient.—Statute Construed.—The remonstrance against the issuing of license to sell intoxicating liquors, provided in section 9, Act of March 11, 1895, must apply to a particular applicant and against whom it is addressed; a general remonstrance is not sufficient. *p. 474.*

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From the Vigo Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, *E. F. Ritter*, *S. M. Huston*, *F. E. Matson*, and *Duncan, Smith & Hornbrook*, for State.

S. R. Hamill, *Lamb & Beasley*, *Elliott & Elliott*, *Zollars & Worden*, *Stewart Bros.*, and *Hammond, Baker & Daniels*, for appellee.

JORDAN, J.—This appeal, together with a number of other cases now pending in this court, involves the validity of an act of the general assembly, approved March 11, 1895, entitled an "Act to better regulate and restrict the sale of intoxicating, spirituous, vinous, and malt liquors," etc. Acts of 1895, p. 248. Some of these appeals also seek to have a judicial interpretation placed upon this statute as to the right of remonstrators to withdraw their names from a remonstrance, interposed by a majority of the voters in a township or ward against granting a license to an applicant. These cases, for hearing and determination, have been consolidated in this appeal. In order to more fully effectuate the purpose for which they were consolidated, the cardinal questions raised in all of them will be considered and decided in this opinion, and the decision herein, on the several propositions, will be controlling on the same questions presented by the other cases. It is better, perhaps, that we state the propositions that are presented by these series of cases and the sections of the statute under which they arise.

In the cause herein entitled, the appellee, Gerhardt, who had been duly licensed to sell intoxicating liquors, under the general license law of 1875, is charged by affidavit and information with having violated section two of the statute of 1895, *supra*, "by failing to provide for the sale of said liquors in a room, separate and apart from other business, but that he

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did unlawfully conduct the sale of groceries in the same room wherein the said liquors were retailed." In the appeal of the *State v. Myers*, No. 17,743, the appellee is charged in three counts with having violated sections two and four of the law in question. First. With failure to provide a room for the sale of intoxicating liquors separate from other business. Second. By keeping in the room where the liquors were sold certain devices for amusement, to-wit: six billiard tables, upon which certain named persons were permitted to play billiards for amusement. Third. That he maintained certain blinds and screens in his saloon so as to prevent the entire view of the interior from the street, during the hours in which the sale of intoxicating liquors is prohibited by law. In *Zapf v. State*, *post*, 696, the appellant is charged with violating section three of this act, by permitting certain mentioned persons, not members of his family, to enter and come into his saloon on a day upon which the sale of liquors was prohibited, to-wit: July 4, 1895. In *Greille v. Wright*, *post*, 699, in addition to other minor matters, the question is presented as to the right of certain remonstrators, under section nine of the act of 1895, to withdraw their names after the filing of the remonstrance and within the beginning of the three days' period allowed for filing the same. Others of these consolidated cases present also these questions: First. As to whether persons who have joined in a remonstrance, and after the same has been filed with the auditor, may be permitted by the board of commissioners to withdraw their names and thereby reduce the remonstrators below the number required by the statute. Second. As to whether the remonstrance is directed against a particular applicant, or generally against granting a license to any one. This statute, which is commonly denominated

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the "Nicholson Bill," differs in several essential features from any other law upon the subject of the sale of intoxicating liquors, heretofore passed by the legislature of this State. In consideration of the public interest, in a proper decision of the questions herein involved, as well as the interest of those who have appeared at the bar of this court, claiming to be aggrieved by reason of the enforcement against them of the provisions of an alleged unconstitutional law, we have given these questions such thought and review as the magnitude and importance thereof demand, and we now proceed to pass in judgment upon the same, stating the reasons which have led us to the conclusions reached.

We may first properly set out the title of the law in controversy, and also some of its principal provisions, or sections, in order that it may be more fully disclosed as to whether the act is open to the contentions or objections of the learned counsel for appellee, by which they seek to expose its alleged invalidity. The act is entitled as follows:

"An act to better regulate and restrict the sale of intoxicating, spirituous, vinous and malt liquors, providing penalties for violation of the same, providing for the enforcement thereof, and providing for remonstrance against the granting of license for the sale of the same and conferring jurisdiction upon police courts and justices of the peace, in cases of violation of the provisions of this act and other laws of the State on the subject of selling intoxicating liquors."

Section one, in substance and in the main, provides that all persons applying for a license to sell intoxicating liquors, under existing laws of this State, shall specifically describe and locate in the application the room wherein he desires to sell such liquors. That no license shall be granted to any other than a male

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person over the age of twenty-one years, who shall be of good moral character, and that he shall not be deemed to possess such character if within two years he shall have been adjudged guilty the second time of violating any of the provisions of the act. Sections two and three are as follows:

"Sec. 2. All persons holding license issued under the law of the State of Indiana, authorizing the sale of spirituous, vinous, malt or other intoxicating liquors in less quantities than a quart at a time, shall provide for the sale of such liquors in a room separate from any other business of any kind, and no devices for amusement or music of any kind or character, or partitions of any kind, shall be permitted in such room, provided, that nothing in the provisions of this act shall be construed to forbid the sale of cigars and tobacco in such place of business: *And provided further*, That if such applicant for license desires to carry on any other or different business, he shall state the same in his application for license, and the same may be granted or refused by the board of commissioners hearing such application and such permission shall be stated in the license if granted.

"Sec. 3. Any room where spirituous, vinous, malt or other intoxicating liquors are sold by virtue of a license under the laws of the State of Indiana, shall be so arranged that the same may be securely closed and locked, and admission thereto prevented and the same shall be securely locked and all persons excluded therefrom on all days and hours upon which the sale of such liquors is prohibited by law. It is hereby made unlawful for the proprietor of such a place and the business herein contemplated of selling intoxicating liquors, to permit any person or persons other than himself and family to go into such room and place where intoxicating liquors are so sold upon

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such days and hours when the sale of such liquors is prohibited by law. The fact that any person or persons are permitted to be in, or go in or out of such room upon any day or hour when the sales of such liquors are prohibited by law, shall be *prima facie* evidence of guilt upon trial of a cause charging the proprietor of such room with violating the law in the sale of such liquors upon such days or hours."

Section four, in substance, provides that any room where intoxicating liquors are sold by virtue of a license issued under the law of this State, shall be situated upon the ground floor of the building, and that said room front the street and be so arranged, either with window or glass door, that the interior thereof may be in view from said street, and that no screens, blinds, or obstructions to the view shall be placed or erected so as to prevent the entire view of said room from the street or highway, during the hours and days when the sales of liquors are prohibited by law. This section further provides that "upon conviction for the violation of this, or either of the foregoing sections of this act, the defendant shall be fined," etc., and that for a second conviction, the court may, and upon a third conviction shall, annul the license and all rights thereunder. Section five makes it a penal offense to suffer minors to loiter in a saloon, and section six forbids the sale to minors, for their own use or for that of any other person. Section seven prescribes the duties of peace officers, and section eight provides to whom permits may be issued, and for the refunding of the license fee in the event of the death or insanity of a person holding a license. Section nine provides for a remonstrance, and is as follows:

"If, three days before any regular session of the board of commissioners of any county, a remonstrance in writing, signed by a majority of the legal voters of

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any township or ward in any city situated in said county, shall be filed with the auditor of the county, against the granting of a license to any applicant for the sale of spirituous, vinous, malt or other intoxicating liquors, under the law of the State of Indiana, with the privilege of allowing the same to be drunk on the premises where sold, within the limits of said township, or city ward, it shall be unlawful thereafter for such board of commissioners to grant such license to such applicant therefor during the period of two years from the date of the filing of such remonstrance. If any such license should be granted by said board during said period, the same shall be null and void, and the holder thereof shall be liable for any sales of liquors made by him, the same as if such sales were made without license. The number to constitute a majority of voters herein referred to shall be determined by the aggregate vote cast in said township or city ward for candidates for the highest office at the last election preceding the filing of such remonstrance."

It is obvious, from the language employed in the title of the statute, that the purpose or intent of the legislature in enacting the law was "*to better regulate and restrict the sale of intoxicating liquors.*" We must presume that the members of the last general assembly had discovered that existing laws were, for some reason, deficient, and that the traffic in intoxicating liquors was not regulated and restricted in such a manner as to promote the public morals and the safety and peace of society, and that a betterment of our laws upon this subject was demanded. The unrestricted traffic in intoxicating liquors has been found, by sad experience, to be fraught with great evil, and to result in the most demoralizing influence upon private morals, and the peace and safety of the

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public; hence the solicitude of the people, in general, upon this subject, and a demand of late upon their part that this restrictive legislation shall be extended beyond its former limits. The policy of the legislature for years past in this State has been, not to encourage its citizens to engage in the retail traffic of liquors as a beverage; therefore, from time to time, this body under the exercise of the police power of the State, has interposed by legislation and imposed upon those engaged in the business, conditions, burdens and restrictions, and heavy penalties for violation of the restrictive provisions of such statutes. These laws being designed to promote the public good, it has been the endeavor of this court to uphold, and so construe them, as to secure the object in view; and it is only when some provision of the organic law has been violated in the manner of their enactment, or under it some fundamental right of a citizen has been clearly abridged, that they have met, in whole or in part, with judicial condemnation. The constitutional objections urged against the statute in controversy by counsel for the appellee are in the main as follows:

1st. The entire act is said to be void for the reason that its material provisions are so interdependent and blended with each other that the portions that are valid cannot be separated from those which are invalid, hence all must fall together.

v 2d. That it is in substance and effect an amendment of the license law of 1875, and the enactment thereof did not conform to section 21, Art. 4, of the constitution, which provides that: "No act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length."

3d. That the title is insufficient, for the reason that it is in contravention of Art. 19, section 4, of our con-

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stitution, viz: "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

4th. Section two is invalid for the following reasons:

a. It delegates legislative powers to the county commissioners.

b. It confers upon such commissioners unlimited and arbitrary power to determine what persons may, or may not, conduct other business in connection with that of retailing liquors.

c. No rule or standard is prescribed for the government of the commissioners, so that there is no law under which they can act.

d. The business of the citizen can only be regulated by law, and it cannot be left to the arbitrary decision of public officers.

e. It violates section 23 of Art. 1, of the constitution, which forbids the general assembly to grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens. It is insisted that the right to conduct a business, even if it be one requiring a license, is a privilege, and the right to be exempted from prosecution is an immunity.

Section two is also said to conflict with the Fourteenth Amendment of the Federal Constitution, as it denies the equal protection of the laws.

6th. The contentions that section three is invalid are:

It violates the right of property guaranteed to every citizen. It prescribes what shall constitute *prima facie* evidence of guilt.

7th. Section nine, it is urged, is invalid for these reasons:

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- a. It is not embraced within the title.
- b. It provides for local prohibition.
- c. It is not properly connected with the act as limited by the title.
- d. It is unconstitutional because it empowers a majority of the voters of a township or ward to suspend the operation of general laws.

Sections seven and eight are also said to be open to several specified constitutional objections, but it is not disclosed by the record that any of the complainants is in an attitude to assail the constitutionality of these sections. It is firmly settled that a party will not be heard by a court to question the validity of a law, or any part thereof, unless he shows that some right of his is impaired or prejudiced thereby. *Currier v. Elliott*, 141 Ind. 394. This fact not appearing, the contentions relative to these sections are dismissed without consideration.

The insistence of counsel as to the invalidity of the statute in question is denied and combated by the learned and eminent attorneys appearing in behalf of the State, and they insist that the enactment of the law as to all of its parts was a valid exercise of the police power by the legislature. As preliminary to a decision of the questions herein involved, it may be proper to call attention to the rule by which this court is controlled in the determination of the constitutionality of any particular law, and also to the extent to which the police power of the State may be invoked to sustain a legislative act. As to the expediency or wisdom of a statute, we have no concern, that is a question lodged wholly within the discretion of the legislature. A court cannot declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the

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citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected by the constitution. *Burrows v. Delta Transportation Co.*, 29 L. R. A. 468; *Praigg v. Western, etc., Co.*, 143 Ind. 358. It is said, and properly so, that the courts are not the guardians of the rights of the people, except as those rights are secured by constitutional provisions which come within judicial cognizance. Cooley Const. Lim. (6th ed.), p. 201. An act of the legislature comes to us as the will of the sovereign power. In the first instance the members of that body must be deemed to be the judges of their own constitutional authority. The State's executive and each member of its general assembly take an oath to support the constitution, both Federal and State, and as these can only be supported by obeying and enforcing their provisions, we must presume that these duties were discharged by our law-makers in the passage of the particular act in question, and by the Governor when he officially gave to it his sanction and approval. For these reasons, and others, all presumptions as to its validity must be indulged in its favor, and it is only when made to appear clearly, palpably, and plainly, and in such a manner as to leave no reasonable doubt or hesitation in our minds, that a statute violates some provision of the constitution that we can consistently declare it void. This rule has been repeatedly affirmed by this court, and by other courts generally throughout the Nation. *Robinson, Treas., v. Schenck*, 102 Ind. 307, *State, ex rel., v. Roby et al.*, 142 Ind. 168.

The police power of a State is recognized by the courts to be one of wide sweep. It is exercised by the State in order to promote the health, safety, comfort, morals, and welfare of the public. The right to exercise this power is said to be inherent in the people in every free government. It is not a grant, derived

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from or under any written constitution. It is not, however, without limitation, and it cannot be invoked so as to invade the fundamental rights of a citizen. As a general proposition, it may be asserted that it is the province of the legislature to decide when the exigency exists for the exercise of this power, but as to what are the subjects which come within it, is evidently a judicial question. *Ritchie v. People*, 155 Ill. 98; 29 L. R. A. 79; 46 Am. St. Rep. 315.

Keeping in mind these salutary rules, we will proceed to consider in detail the objections urged against the statute. We recognize the general rule of the law, that where the constitutional provisions of an act are so blended or interlocked with those which are unconstitutional that they cannot be separated, then all must fall. It is manifest, however, upon an inspection and consideration of the act in controversy, that it does not come within the application of this rule, for the reason that the sections are in the main independent of each other, and if it could be held that some were bad, such a result would not necessarily invalidate the entire act.

It is next insisted that the statute is an amendment to that of 1875, which provides for the granting of a license to retail intoxicating liquors, and is void for the reason of the failure of the legislature to comply with the requirements of Art. 4, section 21, of the Constitution. Neither by its title nor by its terms does it expressly profess to be amendatory of any statute. Its title indicates it to be a distinct and original enactment; and while it is true that it refers to existing laws, relating to the granting of a license, and has a bearing upon the same, and may result in modifying or amending certain parts thereof by implication, still, this, in reason, cannot be said to bring it within

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the mischief which the provision of the constitution referred to was designed to prohibit.

In the appeal of *People v. Mahaney*, 13 Mich. 481, a statute was assailed under a provision of the constitution of the State of Michigan substantially like section 21, *supra*, for like reasons urged by appellee. It was there pertinently said, and the rule affirmed, by Cooley, J., on page 496 of the opinion, as follows:

"If, whenever a new statute is passed, it is necessary that all prior statutes, modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the State would require to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and sewer commissioners, marshals, mayors and justices, and imposes new duties upon the executive and the citizen, it has thereby become necessary to re-enact and republish the various laws relating to them all as now modified, we shall find, before the act is completed, that it not only embraces a large portion of the general laws of the State, but also that it has become obnoxious to the other provisions referred to, because embracing a large number of objects, only one of which can be covered by its title."

The same rule is asserted by this court in *Branham v. Lange, Aud., etc.*, 16 Ind. 497, and reaffirmed in *Barton et ux. v. McWhinney*, 85 Ind. 481. Cooley on Const. Lim. (6th ed.), p. 180. With equal force might the authority of the legislature be denied to enact a general law, limiting the time of taking appeals to this court to six months, thereby changing or amending by implication the law

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as it now exists, relative to the time for taking such appeals. Such a statute might, with the same consistency be attacked for the same reason, namely, that the existing statute, which it amended or modified by implication, should have been published at length as amended. Surely such a contention could not be sustained. It is true, that some portions of the act in question operate upon persons who are exercising rights under the act of 1875, and to that extent only it depends upon the latter law; but this fact manifestly would not bring it within the objections urged by counsel for appellee. Again, upon another view of the question, it may be said, that the legislature, by a long continued and unquestioned practice in the passage of laws which in effect modified or amended other acts upon the same subject, without setting out or specifically referring to those so changed or amended, has given a practical construction upon the question involved. We may properly refer to some of these enactments. Beginning with the general assembly of 1852, immediately following the adoption of our present constitution, an act entitled "An act for the incorporation of railroad companies," was passed. R. S. 1852, Vol. 1, p. 409.

Under this title provision was made; not simply for the incorporation, but for the government, powers, duties and liabilities of such companies.

At the same session, viz: by an act approved June 15, 1852, there was enacted, under the title of "General provisions in regard to railroad companies," an act upon the same general subject as that of the original act. (R. S. 1852, Vol. 1, p. 421), section 5221, Burns' R. S. 1894.

And also, "An act to authorize railroad companies to increase the amount of their capital stock and to increase the number of their directors," approved

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June 18, 1852. (R. S. 1852, p. 423), section 5139, Burns' R. S. 1894.

And also, "An act supplemental to an act to provide for the incorporation of railroad companies," approved June 18, 1852, R. S. 1852, p. 425.

At the next session an act was passed authorizing the filing of copies of articles of association. (Acts of 1853, p. 107), Burns' R. S. 1894, section 5137.

In 1893 there was passed "An act authorizing railroad companies to issue preferred stock in exchange for common stock," approved February 22, 1893. (Acts of 1893, p. 133), Burns' R. S. 1894, section 5140.

In 1873 an act was passed providing for the crossing of railroads, etc. (Acts of 1873, p. 186.)

And also authorizing such companies to make contracts for the use of their tracks. (Acts of 1883, p. 55), Burns' R. S. 1894, section 5156.

In 1883, an act was passed on the subject of railroad crossings at grade. (Acts of 1883, p. 55), Burns' R. S. 1894, section 5156.

In 1893 (Acts of 1893, p. 335), section 5166, Burns' R. S. 1894, an act requiring the recording of deeds, etc., was passed.

At the special session of 1865 (Acts of 1865, p. 118), section 5171, Burns' R. S. 1894, "An act to enable railroads to alter their lines in certain cases," was passed.

In 1891 (Acts of 1891, p. 364, section 5174, Burns' R. S. 1894), there was passed an act for the employment of flagmen.

And in 1875 (Acts of 1875, p. 125, section 5182, Burns' R. S. 1894), an act for the protection of passengers.

In 1889 (Acts of 1889, p. 279, section 5186, Burns' R. S. 1894), an act requiring them to give notice as to whether their trains were on time.

In 1891 (Acts of 1891, p. 70, section 5188, Burns' R.

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S. 1894), an act compelling them to establish waiting rooms, etc.

In 1861 (Acts of 1861, p. 149, section 5201, Burns' R. S. 1894), an act regulating the sale of railroads, and an act on the same subject in 1865. (Acts of 1865, p. 66, section 5209, Burns' R. S. 1894.)

In 1883 (Acts of 1883, p. 182, section 5216, Burns' R. S. 1894), an act authorizing them to indorse and guarantee the bonds of other railroad companies.

In 1855 (Acts of 1855, p. 156, section 5220, Burns' R. S. 1894), an act authorizing them to compromise with the mortgagees.

In 1852 (Acts of 1852, p. 358, as amended, section 5052, Burns' R. S. 1894), the legislature passed an act for the incorporation of manufacturing and mining companies, etc.

In 1875 (Acts of 1875, p. 107, section 5053, Burns' R. S. 1894), it also passed an act for the encouragement of manufacturing and mining companies.

In 1893 (Acts of 1893, p. 162, section 5064, Burns' R. S. 1894), it passed an act authorizing the issuing of preferred stock of manufacturing, etc., companies.

And in 1863 (Acts of 1863, p. 48, section 5075, Burns' R. S. 1894), it passed an act supplemental to the original act.

And in 1867 another supplemental act was passed. (Acts of 1867, p. 155, section 5078, Burns' R. S. 1894.)

In 1865 (Acts of 1865, special session, p. 134, section 5081, Burns' R. S. 1894), an act defining the powers of certain companies organized under the law.

And in 1883 (Acts of 1883, p. 129, section 5087, Burns' R. S. 1894), an act granting further powers to manufacturing companies in regard to taking stock in other companies.

And in 1889 (Acts of 1889, p. 38, section 5099, Burns'

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R. S. 1894), an act declaratory of the meaning and effect of the word "mining" in the law.

And in 1891 (Acts of 1891, p. 423, section 5111, Burns' R. S. 1894), an act supplemental to the acts then in force.

So with insurance companies. The general law was passed under the title: "An act for the incorporation of insurance companies, defining their powers and describing their duties," approved June 17, 1852. (R. S. 1852, p. 331, section 4839, R. S. 1894.)

In 1891 (Acts of 1891, p. 375, section 4894, Burns' R. S. 1894), a separate act was passed conferring certain powers on officers of the company.

And in 1865 (Acts of 1865, p. 114, section 4895, Burns' R. S. 1894), a supplement act was passed.

And in 1883 (Acts of 1883, p. 203, section 4897, Burns' R. S. 1894), an act for governing certain life insurance companies was passed.

And so with the liquor law of 1875. The general law was passed March 17, 1875 (Acts of 1875, special session, p. 55, section 7276, Burns' R. S. 1894).

In 1889 (Acts of 1889, p. 288, section 7280, Burns' R. S. 1894), an act was passed governing appeals from the action of the board with reference to the granting of licenses.

Each of these acts might be said to be as amendatory of the original and existing laws upon the same subject as is the statute in controversy. This continued and repeated practice of the legislature, unquestioned for a period of over forty years, becomes a potent factor, and lends much strength to an interpretation of the constitution favoring the authority of the general assembly to enact, in the manner it did, the law under consideration. Were we in doubt of this legislative right, we should feel obligated to be controlled

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by such a practical exposition. *Hovey, etc., v. State, ex rel.*, 119 Ind. 386; *French v. State, ex rel.*, 141 Ind. 618.

It is obvious, we think, that the provisions of the law of 1875 are not repealed by that of 1895, but that the latter only provided supplemental provisions for the better regulation and restriction of the traffic in intoxicating liquors.

The next insistence is, that the title to the act is insufficient, because it is in contravention of Art. 4, section 19, of the Constitution.

This contention, we think, is untenable. There has been a disposition manifested by this court from time to time, when this same question has been presented, to liberally construe this constitutional mandate, rather than to embarrass legislation by a construction, whose strictness is unnecessary for the accomplishment of the beneficial purpose for which it was designed. The history and reason for the insertion of this provision in the organic law of the State, are well understood, and have been so often given by this court in its decisions, that any further extended statement is thereby rendered unnecessary.

The mischiefs intended to be prevented by section 19 were well stated by Judge Frazer, in *Hingle v. State*, 24 Ind. 28, as follows:

"*First*, The passage of any act under a false and delusive title, which did not indicate the subject-matter contained in the act; a trick by which members of the legislature had been deceived into the support of measures in ignorance of their true character.

"*Second*, The combining together in one act of two or more subjects, having no relation to each other; a method by which members, in order to procure such legislation as they wished, were often constrained to support and pass other measures obnoxious to them, and possessing no intrinsic merit."

The word "subject," as used in this section, indicates

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the thing about which legislation is had, and the word "matters" the things which are secondary, subordinate, or incidental. *Hingle v. State, supra*. The subject of the act in question is "The better regulation and restriction of the sale of intoxicating liquors." The matters properly connected therewith are:

First. Providing penalties for a violation of the act, and providing for its enforcement.

Second. Providing for a remonstrance against the granting of licenses.

Third. Conferring jurisdiction upon certain courts for the violation of this and other laws upon the subject of selling intoxicating liquors.

The subject is clearly expressed in the title. The latter fully indicates the purpose of the legislation, and informs all persons as to the provisions of the act. The matters embraced in the body of this statute are details of the method by which the sale of intoxicating liquors is to be "better regulated and restricted." All of them, it appears to us, are germane to the subject, and appropriately and properly connected therewith. The following decisions support our conclusion: *State v. Newton*, 59 Ind. 173; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768; *Shipley v. City of Terre Haute, etc.*, 74 Ind. 297; *Indiana, etc., R. W. Co. v. Potts*, 7 Ind. 681; *Robinson v. Skipworth*, 23 Ind. 311; *Bright v. McCullough, Treas., etc.*, 27 Ind. 223; *State v. Adamson*, 14 Ind. 296; *State, ex rel., v. Sullivan*, 74 Ind. 121; *Jett v. City of Richmond*, 78 Ind. 316; *Kane v. State, ex rel.*, 78 Ind. 103; *Barnett v. Harshbarger, Admr.*, 105 Ind. 410; *City of Indianapolis, etc., v. Huegele*, 115 Ind. 581. See also *Bank of the State v. City of New Albany*, 11 Ind. 139; *Reams v. State*, 23 Ind. 111; *Peachee v. State*, 63 Ind. 399; *Elder v. State*, 96 Ind. 162; *Shoemaker, Aud., v. Smith*, 37 Ind. 122; *State, ex rel., etc., v. Board, etc.*, 26 Ind. 522.

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We are next confronted with a more difficult proposition, the invalidity of section two; the question, in the main, is not as to the power of the legislature to prescribe the conditions or prohibit the acts which it has, in the section in dispute, but it is one applying to the arbitrary manner in which it is claimed the board of commissioners is authorized by the proviso of this section to exercise the power of awarding a permit to an applicant to conduct other business in connection with the sale of his liquors. It is the opinion of the majority of the court that the validity of that part of the statute embraced within this proviso, can be sustained. From this holding the writer of this opinion is compelled to dissent, for the reasons given in his dissenting opinion. The views of the majority of the court upon this question are stated as follows:

All statutes *in pari materia* are to be construed together. *Earl of Ailesbury v. Pattison*, 1 Douglas 28.

The legislature is presumed to have had former statutes before it, and to have been acquainted with their judicial construction, and passed new statutes on the same subject with reference thereto. *Steel v. Lineberger*, 72 Pa. St. 239.

When a number of statutes, whenever passed, relate to the same thing or general subject-matter, they are to be construed together and are *in pari materia*. *U. S. v. Freeman*, 3 Howard (U. S.), 556-564; *Ferguson v. Board, etc., Monroe Co.*, 71 Miss. 524; *Commonwealth v. Sylvester*, 13 Allen (Mass.), 247; *City of Louisville v. Commonwealth*, 9 Dana (Ky.), 70; *State v. Clark, Aud.*, 54 Mo. 216; *Roff, etc., v. Johnson*, 40 Ga. 555; *Linton's Appeal*, 104 Pa. St. 228; *Perkins v. Perkins*, 62 Barb. 531; *United Society v. Eagle Bank*, 7 Conn. 456; Black on Interp. of Laws, section 86.

We quote from Black on Interp. of Laws, p. 206:

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"It is a phrase applicable to public statutes or general laws, made at different times, and in reference to the same subject. Thus, the English laws concerning paupers and their bankrupt acts are construed together, as if they were one statute and as forming a united system. * * * Such laws are *in paria materia*. To illustrate further, all the statutes of the same State relating to the property-rights and contracts of married women, removing their common law disabilities, authorizing them to manage their separate estates, to engage in business, etc., are to be read and construed together as constituting one system. Though they may have been passed at different times, successively advancing to a standard the opposite of that of the common law, they are all strictly *in pari materia*, and any doubt or ambiguity in one should be cleared up by reference to the terms, the purpose, and the policy of the rest. Again, an act authorizing married women to dispose of their property by will is *in pari materia* with the general statute relating to the execution and proof of wills. * * * So also, all the laws of the State, whenever passed, relating to the subject of the regulation of the liquor traffic are *in pari materia*."

The act known as the Nicholson law is supplemental to and *in pari materia* with the license law of 1875, and the same are therefore to be construed together.

It is also the rule that whenever the statute can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, such construction will be adopted by the courts. *Warren, Aud., v. Britton, Treas.*, 84 Ind. 14; *Campbell v. Dwiggins, Treas.*, 83 Ind. 473; *Hays v. Tippy*, 91 Ind. 102; *State, ex rel., v. Roby*, 142 Ind. 168, 51 Am. St. Rep. 174; *Newland v. Marsh*, 19 Ill. 376; *Dow v. Norris*, 4 N. H.

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16, 17 Am. Dec. 400; *Grenada Co. v. Brogden*, 112 U. S. 261, and cases cited on p. 269; *Marshall v. Grimes*, 41 Miss. 27, 31.

It should not be assumed that the law-making department of the government intended to usurp or assume power prohibited to it, but in all cases the contrary presumption prevails.

Judge Cooley, in his work on Const. Lim. (6th ed.), p. 218, says: "For as a conflict between the statute and the constitution is not to be implied, it would seem to follow, where the meaning of the constitution is clear, *that the court, if possible, must give the statute such a construction as will enable it to have effect.* This is only saying, in another form of words, that the court must construe the statute in accordance with the legislative intent; since it is always to be presumed the legislature designed the statute to take effect, and not to be a nullity."

The principle upon which is based the regulation of the liquor traffic is found in the police power of the State, and it should be remembered, in construing all statutes on that subject, that no one possesses an inalienable or constitutional right to keep a saloon for the sale of intoxicating liquors. *Sherlock v. Stuart*, 96 Mich. 193.

"To sell intoxicating liquor at retail is not a natural right to pursue an ordinary calling." *Black Intox. Liq.*, section 48.

The act of 1875 does not define what constitutes fitness or unfitness. Said act is in full force and effect, except as modified by the act of 1895. The question of the fitness or unfitness of an applicant remains for the board of commissioners to determine, under said act, unless a remonstrance, signed by a majority of the legal voters, is filed, as required by section 9 of the act of 1895.

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The question of the fitness of an applicant, under the act of 1875, was not a question of law, but one of fact, to be determined by the board of commissioners, or the trial court on appeal. *Pelley v. Wills*, 141 Ind. 688; *Hardesty v. Hine*, 135 Ind. 72; *Stockwell v. Brant*, 97 Ind. 474; *Keiser v. Lines*, 57 Ind. 431.

In determining the question of the fitness or unfitness of an applicant, under said act prior to the act of 1895, it was proper for the board of commissioners to take into account the place where he desired to sell intoxicating liquors, its proximity to the courthouse, schoolhouses, churches, and all other surroundings, for the reason that it might be that only a man possessed of an extraordinary degree of circumspection and caution could fitly conduct the business at that place on account of the situation and surroundings. *Eslinger v. East*, 100 Ind. 434.

Construing section two, of the act of 1895, with sections three and four, of the act of 1875, concerning the fitness of an applicant to be intrusted with the sale of intoxicating liquors, the power given the board to grant or refuse a license to sell intoxicating liquors and carry on some other kind of business in the same room, is not an arbitrary one.

If an applicant for a license to sell intoxicating liquors also desires to carry on any other or different business in the same room, and states such fact in his application, as required by the last proviso to section two of the act of 1895, it is a question of fact for the board of commissioners to determine whether such applicant is a fit person to be intrusted with the sale of intoxicating liquors, under the laws of the State, and carry on the other or different business stated in the application in the same room. If the board find, from the evidence, that he is, the license is granted, as prayed for.

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But if the applicant is found to be a fit person to be intrusted with a license to sell intoxicating liquors in a room separate from any other business of any kind, and not fit to be intrusted with the sale of intoxicating liquors in the same room with the other business stated in the application, a license would only be granted to sell intoxicating liquors in a room separate from any other business of any kind, the same as if the applicant had not taken any steps under the last proviso of section 2.

If, however, the board finds he is not a fit person to be intrusted with the sale of intoxicating liquors in a less quantity than a quart at a time, in a room separate from any other business of any kind, under the license laws of this State, his application would be refused.

So construed, said proviso is not open to the objection that it confers absolute or arbitrary power upon the board of commissioners, but all applicants are entitled to the same privileges upon the same condition, that of fitness.

In determining the fitness of the applicant in such case, locality and surroundings, including the other kind of business he desires to carry on in connection with the sale of intoxicating liquors, are proper matters for consideration.

So that whether the application is for a license to sell intoxicating liquors alone, or contains a request under the last proviso to said section two, the question is whether the applicant is a fit person to be intrusted with the sale of intoxicating liquors, in the manner and with the other business, if any, set forth in his application, considered with reference to the location and all the surroundings.

It would seem that, under the doctrine declared in *City of Indianapolis v. Bieler*, 138 Ind. 30, and author-

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ities cited on p. 38, that even if the last clause to section two was unconstitutional, that the remainder of said section would be constitutional. See also, *Peniman's Case*, 103 U. S. 714; *Presser v. Illinois*, 116 U. S. 252.

The validity of the proviso in controversy being upheld, it is manifest that section two is not open to the other objections urged against it by counsel for appellee. The section, we think, prescribes, or imposes, valid restrictions upon the dealer in liquors as to the place wherein the same are sold. First, in requiring him to conduct the business of selling his liquors in a room where no other business is carried on, and, second, in prohibiting devices for amusement or music from being permitted therein. Each of these provisions, we think, define a separate public offense, the violation of any one of which will subject the offender to the penalty of section four of the act in controversy.

This section recognizes the right of a holder of a license to carry on thereunder the business of retailing liquors. In the absence of the permit, provided for by the second proviso, the requirements of the section confine the sale of liquors to a room separate from any other business, except that of selling cigars and tobacco. By its operation it also removes from the saloon all such allurements as music and devices for amusement of any kind, by the means of which both the old and the young might be induced to enter and loiter therein, to their own detriment and that of the public. Surely the power of the legislature to impose such restrictions upon the vendor of intoxicants cannot be successfully denied.

We cannot concur, with counsel for the appellee, that section three is open to the objections urged against it. The contention that the legislature is not

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authorized to make certain facts *prima facie* evidence of guilt cannot be sustained. This question was fully considered by this court in *State v. Beach*, at last term (Ind. Sup.), 43 N. E. Rep. 949, and decided adversely to the claim of appellee. The power to prohibit the sale of intoxicating liquors in the interest of public safety or welfare during certain prescribed periods is not denied. The legislature, possessing this right, as it unquestionably does, may further exercise or extend it so as to require a proprietor of a liquor saloon to securely close the same, and permit no person to enter therein, as provided by this section, during the times when the sale of intoxicating liquors is forbidden. This legislative power is recognized and settled in the case of *Decker v. Sargeant*, 125 Ind. 404; *Davis v. Fasig*, 128 Ind. 271.

As the closing features of section three apply only to the prohibited days and hours, we fail to recognize how any great hardship can result from the enforcement of this law. In answer to the contention that the enforcement of the requirements of this section might incidentally result in interfering, during such interdicted time, with other business that may be conducted by the proprietor in the same room where such liquors are sold, or may restrict him in the enjoyment in his own house of the society of his friends, it may be said that when he accepted his license, under the statute, and embarked in the sale of intoxicating liquors thereunder, he must be deemed to have consented to all proper conditions and restrictions which had been imposed by the legislature, or which might in the future be imposed in the interest of the public morals and safety, relative to the traffic in such liquors, or to the place wherein he was granted a permit to sell the same, notwithstanding their burdensome character. *Decker v. Sargeant*, *supra*; Black on Intox. Liq., section 50.

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A license to engage in the liquor traffic is not a contract or grant, but a mere permit, and the applicant who receives it does so with the knowledge that it is at all times within the control of the legislature. *McKinney v. Town of Salem*, 77 Ind. 213; *State, ex rel., v. Bonnell*, 119 Ind. 494; *Moore v. City of Indianapolis*, 120 Ind. 483; Black on Intox. Liq., section 51.

The rule of law as above asserted, applies with equal force in support of the validity of the restrictive features of section two.

It is true, that the part relative to the exclusion of persons is somewhat sweeping, making but one exception; however, criminal statutes are not always literally construed, and possibly an emergency might arise of great necessity, to admit some one other than those mentioned in the section, and while such admission might infringe upon the letter of the statute, it would not come within its spirit, and the court, under the particular circumstances, might make the necessary exception, but as to this point we do not decide. See *Donnell v. State*, 2 Ind. 658; *Hooper v. State*, 56 Ind. 153. We therefore sustain the validity of section three, and adjudge that it defines a public offense.

Another objection is urged against sections three and four, because of the following language in the latter: "For a violation of this or either of the foregoing sections of this act, the defendant shall be fined," etc. It is contended that by this clause no penalty is fixed for the violation of the provisions of any section, unless all the provisions thereof have been violated. The violation of a section of this act may be, in part or as a whole, and in either case the penalty provided in section four is prescribed. In *Miller v. State*, 3 Ohio St. 475, it was held that a violation of either of the sections of the statute therein involved, subjected the accused to the penalty mentioned

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in another section, which provided for a penalty for the violation of all. There is no merit in the objections urged by appellee in this respect. See *Jessup v. State*, 14 Ind. App. 257.

The validity of section nine of the act, as we have heretofore stated, is called in question, upon the grounds, that it is not a matter properly connected with the subject of the statute; that it constitutes local prohibition; and further, that it delegates legislative power to the people to suspend the general license law of the State. It is further insisted that the title in no way indicates that there will be found in the act a section authorizing the majority of the legal voters in the several townships and wards, to establish prohibition therein. We are of the opinion that the validity of this section cannot be successfully assailed upon any of these grounds. In furtherance of what we have heretofore said, in regard to the sufficiency of the title, we may say, that the subject expressed in the title is not only "to better regulate," but "to better regulate and restrict the sale of intoxicating liquors." Under this title, we think, it was competent to embody in the act the provisions of section nine, making the granting of a permit by the board of commissioners subject to the condition and restriction that no remonstrance against the same, signed by a majority of the legal voters of the specified districts, was filed with the auditor three days prior to the beginning of a regular session, at which, the application therefor was made. This provision was not enacted with the view of absolutely prohibiting the sale of liquors, but only as a restriction to the granting of a license, and, thereby, better restraining the traffic in intoxicating liquors. All laws which regulate, or restrict, the sale of such liquors, by imposing burdens or conditions upon the business, are in their

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nature or character to an extent, at least, prohibitory. *Welsh v. State*, 126 Ind. 71. In the case last cited, it is said: "Acting upon the just assumption that the unrestricted sale of intoxicating liquors results in much evil, and that it is detrimental to society, the law-making power of each State in the Union has, in the exercise of its police power, assumed to control, regulate or prohibit the business, as seemed to it best."

Counsel place much stress upon these words in the title: "Providing for remonstrance against the granting of license for the sale of the same." We do not think it was necessary to employ these words in the title, as the provisions in regard to the remonstrance, found in the body of the act, was within the scope of the title, being matter properly connected with the subject. The license law of 1875 provides for a remonstrance by a voter against the granting of a license thereunder, for certain prescribed reasons, but the word remonstrance is not in the title of that act, and there is nothing to indicate that such a provision will be found in the body of the law, except in the general scope of the subject. It is an undisputed fact that county commissioners have no power to grant a license to anyone to retail intoxicating liquors, except as it has been expressly conferred upon them by statute. That the legislature is invested with full power to regulate and restrict the jurisdiction of this tribunal, cannot be successfully denied. Under the license act of 1875, certain prescribed conditions, or restrictions are imposed, relative to the authority of the board of commissioners to grant a license. The board is required to find that the person applying possesses the moral qualifications contemplated by the act, as will fit him to be intrusted thereunder with a license, and that he is not in the habit of becoming intoxicated. The failure to establish these facts, de-

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feats the applicant. By section nine, another condition, or restriction, is imposed upon the jurisdiction of the board relative to granting a license to retail liquors to any applicant, namely, the fact that a remonstrance against him, signed by a majority of the legal voters of the township or ward wherein he intends to engage in the sale of such liquors, has been filed with the auditor, three days before the beginning of the regular session of the board at which the application for the license is to be presented. In the event this fact is found to exist, the jurisdiction of the commissioners over the matter, by virtue of the law, is terminated, and it is made unlawful for them to grant the license to the applicant. But, on the contrary, if this fact is found not to exist, the board can then proceed to inquire, according to law and the evidence, into the fitness and right of the applicant to be intrusted with the desired license. In *Goresch v. State*, 42 Ind. 547, the constitutionality of the liquor act of 1873, known as the "Baxter Law," was called in question upon similar objections which are urged against section nine.

Section two, of this law, required that the petition of an applicant for a permit to sell liquors thereunder, certifying as to his residence and fitness, must be signed by himself, and also by a majority of the legal voters of a township or ward, and filed with the auditor twenty days before the term of any regular session of the county commissioners. The section then provided as follows: "The board shall examine such petition, and if satisfied the same is in proper form, and that it has been signed as hereinbefore required, shall direct a permit to be issued," etc. The validity of section two was sustained by the decision in the case last cited. This court there said: "The ground taken is, that the law is not in force in

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any township, town, or ward of a city, until the requisite number of voters have signed a petition, and that it is the act of such voters in signing the petition which makes the law. In our judgment, this position is untenable. We cannot regard the act as conferring upon the petitioners legislative authority in any sense of these terms. It might as well be said that the law which authorizes the laying out of a public highway by authority of the county commissioners, upon the petition of a designated number of persons, was unconstitutional, because it conferred upon such petitioners legislative authority. * * * Thus the qualifications and fitness of each person, as well as the wish of the petitioners for the establishment of the business in their neighborhood, are at once settled by the voice of those who are most intimately concerned. If they do not thus open the door to the traffic, the law provides that, so far as that applicant is concerned, it shall remain closed. This is a species of self-government which by the law is placed in the hands of the people to be exercised by a majority of them according as they may judge to be for their best interest. It is believed that the privilege of retailing intoxicating liquors has never, under any law which has ever been enacted in this State, been granted unconditionally. That the applicant should comply with certain conditions, such as the presentation of a petition signed by a designated number of persons, make proof of his fitness to have a license, or execute a bond, etc., has been a feature of every law which has ever been in force in this State. To comply with such condition has not been heretofore supposed to be an exercise of legislative authority."

The decision in that case, upon the question involved, must be accepted as decisive of the one now under consideration. The principle at issue in that

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appeal, upon section two of that act, and the one arising under section nine of the law of 1895, we think, are substantially the same. By virtue of the required petition being filed under the "Baxter Law" twenty days before the regular term of the board, the law directed the permit to be issued. Under the section now in controversy, by virtue of the required remonstrance being filed three days before the regular session, it is rendered unlawful for the board to grant a license to such applicant therefor. By the former act the burden was cast upon the applicant to secure the required number of voters to sign his petition. In the latter, it is upon the remonstrators to obtain the requisite number to sign the remonstrance in order to defeat the granting of the license. The rule is generally asserted, and is not denied, that the power invested in the legislature to pass, repeal, or suspend laws cannot be delegated to the people. By section nine no authority is attempted to be lodged in the voters to suspend the operation of any of the provisions of the general license law of 1875. The result of the remonstrance therein provided serves as a restriction or inhibition upon the jurisdiction of the board to grant a license, under the act of 1875, to the particular applicant, against whom the remonstrance is directed. The section as it came from the legislature was a complete and perfect enactment, prescribing a rule or action, and, under like circumstances, it is operative in all parts of the State. See *State, ex rel., v. Forkner* (Iowa Supreme Court), 28 L. R. A. 206, and the many authorities there cited. The validity of the two years' limitation in section nine, which debar a defeated applicant thereunder from receiving a license during said period, is not presented by any of the records in this appeal, and is, therefore, not deter-

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mined. But two questions remain which require consideration in this opinion, namely:

First. Has a remonstrant, after the expiration of the time within which a remonstrance may be filed, the absolute right without cause to withdraw from it, leaving the remonstrance, which theretofore had contained sufficient remonstrants to defeat the granting of the license, insufficient on account of the withdrawal of the signatures to accomplish the result?

Second. Does the remonstrance provided in section nine apply to the particular applicant whose application is then pending and against which it is addressed, or is it required to be general against the granting of a license to any applicant within the district under consideration?

The first of these, we think, must be answered in the negative. We have held that the power of the board of commissioners to grant a particular license, depends upon the fact whether three days before its regular session a remonstrance, signed by a majority of the legal voters of the township or ward, has been filed with the auditor. That, if the board finds this fact to exist, it could proceed no further in the matter, but must dismiss the application. The existence of this fact is manifestly jurisdictional, and, under a proper and reasonable interpretation of section nine, the right of a voter, or voters, to withdraw so as to leave a less number than is required by the law cannot be maintained. Until the beginning of this three days' period, whether the remonstrance has been placed on file or not, any remonstrator must be deemed to have the absolute right by some affirmative act of his own, to withdraw his name from such remonstrance. But if this right is not exercised prior to the beginning of the first day of this three days' period, it no longer

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exists. In *Carr v. Boone*, 108 Ind. 241, a drainage petition was pending, and the report of the commissioners had been filed and confirmed. Thereafter one of the petitioners moved to dismiss the proceedings, but his motion was denied by the lower court. This court, in passing upon the question, on page 245 of the opinion, said:

"This motion came too late. Rights had been acquired and money expended on the faith of the order made upon the first report, and justice requires that a petitioner should not be allowed to destroy rights which his own act had been the means of creating. The case is not at all like that of an ordinary civil action, for, in such a proceeding as this, the public and many persons have a common interest, and he who sets on foot the proceedings cannot be permitted to end it to the injury of the public and others, by dismissing the petition." The following authorities also lend support to our conclusion upon this point: *State v. Reingardt*, 46 N. J. L. 337; *In re Sargeant*, 13 Nat. Bankruptcy Reg. 144; *Noonan v. Orton*, 31 Wis. 265; *Loring v. Brackett*, 3 Pick. 403; *Winslow v. Newlan*, 45 Ill. 145.

In re Sargeant, *supra*, the court said: "Where creditors in good faith join in a petition in bankruptcy, they cannot afterwards withdraw so as to leave a less number and amount of the creditors than is required by law, and deprive the court of jurisdiction, as to the matter of adjudication."

In answer to the second question, we are of the opinion that the remonstrance, provided for by section nine, has application only to some particular applicant, and does not contemplate a general remonstrance, but one directed against each individual who desires to secure a license. The language of the law is, "it shall be unlawful, etc., to grant such license to

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such applicant therefor." In the act of 1838, which was under consideration in the case of *Woods v. Pratt*, 5 Blackf. 377, the wording of the statute was materially different, it read: "No license shall be granted to any person residing within any town or township where a majority of the freeholders in such town or township shall remonstrate against granting the same." The obvious meaning of that law was that, in the event of the required remonstrance, a license to retail liquors could not be granted to any person who might thereafter apply. As far as the operation of the act of 1838 was concerned, it was not necessary that there should be any applicant against whom the remonstrance might, at the time, be directed. It was against the evil of the traffic in liquors, and not especially against any particular applicant.

This is the construction placed upon it by the court in *Woods v. Pratt*, *supra*. It follows, therefore, that this decision is not controlling upon the question here involved.

Other minor questions, relative to practice, etc., involved in some of the causes consolidated with this appeal, will be decided separately in said causes. As heretofore said, the purpose of this opinion is to determine the validity of the law and to give an interpretation to the principal features of section nine.

It follows, from the holding of the majority of the court, that the judgment in this appeal of *State v. Gerhardt*, must be reversed, and it is so ordered.

HACKNEY and JORDAN, Judges, dissent in part.

DISSENTING OPINION.

JORDAN, J.—I am constrained to dissent from that part of the conclusion of the majority of the court, whereby the constitutional validity of that portion of

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section two, embraced within the last proviso is affirmed. To hold that the theory of this proviso has such an application to the fitness of an applicant, that the fact that the latter desires a license to retail liquors in a room wherein he intends to conduct other business, may be considered by the board, in deciding upon his right to be intrusted, under the act of 1875, with such license, cannot be maintained, except by a strained and unreasonable interpretation of the statute. The first section of the law had already specified certain facts to be considered by the county commissioners in the determination of the applicant's right, under the law, to receive a license, and it cannot be presumed that the legislature impliedly intended to engraft this proviso, upon other provisions of the law, applying to the fitness of one seeking to obtain a license to sell intoxicating liquors.

The unreasonableness of such an interpretation is apparent.

The first clause of the section in question requires that all persons holding a license, under the law of the State of Indiana, authorizing the sale of spirituous, etc., liquors in less quantities than a quart at a time, shall provide for the sale of such liquors in a room separate from any other business of any kind, etc. The section closes with a *proviso* as follows: "*And provided further, That if such applicant for license desires to carry on any other or different business, he shall state the same in his application for license, and the same may be granted or refused by the board of commissioners hearing such application, and such permission shall be stated in the license if granted.*" For a failure to comply with the requirements of this section, the person so offending is made subject to the penalty of section four. It will be observed that the first clause of this section denies to all

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persons holding a license to retail intoxicating liquors under the law of this State, the right to sell the same in a room wherein other business is conducted; while, by the latter part, which is the proviso, the question of either permitting or denying the right, or privilege, is submitted to the board of commissioners, without any fixed or prescribed limitations, terms, conditions, or standard of any kind by which the qualifications or fitness of the applicant to carry on other or different business in the same room where the liquors are to be sold, may be measured. This provision, I think, clearly attempts to invest these inferior officials with an arbitrary, undefined, and unlimited power to determine who, and who may not, be entitled to the privilege of conducting some other lawful business in the same room wherein intoxicating liquors are, under the law, permitted to be retailed. It is left, by this provision of the statute, as a mere matter of choice, to be exercised upon the part of the board of commissioners, as between two applicants for this permit, belonging to the same class, and on equal terms in all respects with each other, as to the fitness, conditions, etc., to decide as to which one the privilege shall be granted, and as to which one it shall be refused. Invested with this unfettered power, no measure of a legal right to the privilege could be attained. Each applicant would therefore depend for success upon some discretionary standard that might be erected by the particular board hearing the application. Under this undefined power, one man in a city or town, by means of influence, evil or otherwise, might possibly secure from the commissioners a grant to conduct a restaurant or the business of selling groceries in the same room where intoxicating liquors were sold in less quantities than a quart, while all other applicants, on equal terms, and similarly sit-

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uated, might be denied the privilege. With the same logic, force, and reason it might be insisted that, under the constitution, the general assembly has the power to authorize boards of commissioners, upon granting a license to retail intoxicating liquors to arbitrarily prescribe the fee to be paid for the privilege, and likewise the conditions of the bond which the licensee should execute, and the character or situation of the room wherein the liquors are to be sold. Certainly, no one, in reason, could affirm the validity of such a law. The mere statement of such a proposition exposes the absurdity thereof. A statute is a rule of action, prescribed or declared by the legislature, and the manner in which it shall be applied to control the conduct of the citizen must be fixed by the legislative body with reasonable certainty.

Judge Cooley, in his work on Const. Lim. (6th ed), says: "Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and countryman at plough.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."

After prohibiting a licensed retailer of liquors from selling the same in a room in connection with other business, the section proceeds upon the theory that it may be proper for him to do so, and the question of permitting him to exercise this right is then submitted to the board for its determination, with no legally defined or fixed terms, conditions or circumstances, for its guidance in its decision as to the propriety of granting or refusing the desired privilege. The license law of 1875 fixed a standard of moral qualifications, fitness, and freedom from habitual intoxication, as a test of the legal

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right of one to be granted a license to engage in the sale of liquors. This court, in the appeal of *Grummon v. Holmes*, 76 Ind. 585, held that where a remonstrance, under that act, was interposed against the granting of a license, that the immorality or other unfitness imputed therein to the particular applicant, ought to be set forth with such a degree of certainty as would advise him of the nature of the charge, so that he might be prepared to meet it. The principle here at issue has been considered by this court upon four other occasions, and each time the question has been decided adversely to the contentions of counsel for the State.

In *Bessonics v. City of Indianapolis*, 71 Ind. 189, the city sought to require that hospitals within its limits should be conducted only upon a permit to be secured upon notice and application to the council and board of aldermen. The ordinance was held invalid. Worden, J., on page 198 of the opinion, said: "It is apparent, that, under the ordinance, if valid, the common council and board of aldermen have the power, to grant or refuse the license in any given case, at their mere pleasure; and that no one can conduct or maintain a hospital within the city, however harmless or beneficial it might be, except by the consent of the common council and board of aldermen.

"It is not necessary to suppose that the common council and board of aldermen would abuse the power thus assumed by them, to grant or refuse the license, as they might think proper, or that they would exercise it otherwise than as they might think for the public good. It is sufficient to say, that, if the ordinance is valid, the common council and board of aldermen have it in their power to grant one person a license, and refuse another, under the same circumstances. No law could be valid, which, by its terms, would

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authorize the passage of such an ordinance. The 23d section of the Bill of Rights provides, that "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." What the legislature cannot do directly in this respect, it cannot authorize a municipal corporation to do."

In the case of *Bills v. City of Goshen*, 117 Ind. 221, an ordinance requiring a license to conduct the business of roller skating upon the payment of such a fee as the mayor or common council should determine in each particular case, was held invalid. The court quoted with approval from *Horv and Bemis on Mun. Ordinances*, this language: "The ordinance itself should specify every condition of the license, and the officer should be merely intrusted with the duty of issuing licenses."

In the case of *City of Richmond v. Dudley*, 129 Ind. 112, an ordinance placing restrictions upon the keeping of explosive oils, was held void for the reason that it permitted the exercise of arbitrary discrimination by the municipal officers. This court, after reviewing the decisions of several States, and the case of *Yick Wo v. Hopkins*, 118 U. S. 356, said: "It seems, from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities, between citizens who will so comply."

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In the *City of Plymouth v. Schulthcis*, 135 Ind. 339, the principle asserted in the cases last cited was again considered, and sustained. Cases which support the principle contended for by counsel for appellee are numerous. In *Yick Wo v. Hopkins*, *supra*, an ordinance of the city of San Francisco, prohibiting the conducting of laundries without a permit from the city's board of supervisors, except in buildings constructed of stone, was held to be void. Justice Matthews, in the course of the opinion, said: "It does not prescribe a rule and conditions for the regulation of the use of the property for laundry purposes, to which all similarly situated may conform. It allows without restriction, the use for such purpose of buildings of brick or stone; but, as to wooden buildings, constituting nearly all of those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living."

In the case of *Robison v. Miner & Haug*, 68 Mich. 549, certain provisions of a statute, authorizing local boards to reject the bond of a liquor dealer if the latter was known to them to be a person whose character or habits would render him unfit to conduct the business, and allowing a county treasurer to require a new bond upon any contingency that he should determine required it, were held to be unconstitutional. Camp-

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bell, J., in considering the question, stated the principle as follows:

"If the law itself singled out any class or classes of persons as improper to be allowed to carry on this business, then the only inquiry would be as to the fact of anyone belonging to the forbidden classes. But, in such a case, without an admission of it, the applicant would certainly have the right to some hearing on the facts, and to be assured a hearing which could be examined by some court in case of capricious abuse. The subject was somewhat discussed in *Dullam v. Willson*, 53 Mich. 392 (19 N. W. Rep. 112), where many cases were referred to, showing the right of accused parties to know what they are accused of, and to have a hearing which will give them means of fairly meeting the charges. Without this there can be neither fairness nor uniformity in the operation of the law. If no standard is laid down, there may be as many scales of fitness and unfitness as there are boards. We have already had occasion, under the old law, to discover that boards desirous of preventing liquor-selling are ingenious in finding fault with bondsmen. There are very many excellent people who regard every seller of liquor as a bad man, unfit for social privileges, and others who hold peculiar views on other topics, which would render them harsh censors. If the statute had fixed the rule, there would be means of protecting parties against caprice and condemnation unheard. But when the same persons are to be judges of the proper causes of rejection, as well as of the fitness of persons under such causes, the law subjects everyone to the mere will of his neighbors, and gives him no rights whatever. No man's rights can be submitted, under a constitutional government, to the discretion of anybody." *Frazee's Case*, 63 Mich. 396, 6 Am. St. Rep. 310.

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Sherwood, J., in a separate opinion, concurring with Judge Campbell upon this point, said: "I agree with my brother Campbell, this cannot lawfully be done under our form of government. It is within the province of the legislature to allow any person to engage in the business of making and selling intoxicating liquors. It is also within its power to limit the business to certain persons or classes, or to attach to its exercise conditions and such restrictions as it may deem proper for the best interest of the State and the people, not inconsistent with the spirit of the provisions of the constitution. But when conditions only are imposed, and all persons are permitted to engage in the business upon performing such conditions, the business remains a lawful one while it may be carried on, and such conditions must be reasonable. The legislature alone has the power to impose them, and when they relate to qualifications of the person who is to carry it on, involving his character and habits, requiring those of fitness for the business, *the law-making power should be specific in its requirements, and state particularly the elements entering into the necessary qualifications.* This should be done that persons desiring to engage in the business may know whether they possess such qualifications or not, and, if they are denied to them, that they may have the opportunity of showing that they do possess them. *The right to carry on a lawful business cannot be made to depend upon the arbitrary will or caprice of any man, or local board, as is done under this law. Some standard of qualification must be fixed by the law itself, and then, whether the person who desires to engage in the business possesses the qualifications, measured by such standard, may be submitted to and determined by such local board as the legislature may designate.*" The italics are my own.

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In the appeal of the *State v. Tenant*, 110 N. C. 609, 15 L. R. A. 423, the authorities are collected and reviewed by the court, and it was there held that the ordinance in question, forbidding any person to proceed with the erection of a building until a permit was issued to the owner, ought to have specified the conditions of the permit. Avery, J., there said: "It is equally clear, that if an ordinance is passed by a municipal corporation, which, upon its face, restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen, who may exercise it so as to give exclusive profits or privileges to particular persons."

Decisions upon this subject are many, but I do not deem it necessary to comment upon them or extend this opinion further by quotations therefrom. In addition to those, however, that I have cited, see the following: *O'Neil v. The American Fire Ins. Co.*, 166 Pa. St. 72, 26 L. R. A. 715; *City of Newton v. Belger*, 143 Mass. 598; *May v. People*, 1 Colo. App. 157, 27 Pac. Rep. 1010; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Anderson v. City of Wellington*, 40 Kan. 173, 10 Am. St. Rep. 175; *In re Frazee*, *supra*; *Tugman v. Chicago*, 78 Ill. 405; *Village of Braceville v. Doherty*, 30 Ill. App. 645; *Barthet v. City of New Orleans*, 24 Fed. Rep. 563; *Town of Lake View v. Letz*, 44 Ill. 81; *State v. Mahner* (La.), 9 So. Rep. 480; *City of East St. Louis v. Wehrung*, 50 Ill. 28; *City of Kimmundy v. Mahan*, 72 Ill. 462; *Horn v. People*, 25 Mich. 221; *Waite v. Garston*, *etc.*, L. R., 3 Q. B. 5; *State, ex rel., v. Der-*

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ing, 84 Wis. 585, 36 Am. St. Rep. 948, *Chicago v. Trotter*, 136 Ill. 430.

Under a constitutional government like ours the conduct of its citizens cannot be subjected to the arbitrary will of any individual, and anything that may tend to despotism, even in a mild form, is contrary to the genius of a free government. By section 23, of the Bill of Rights, it is seen that the general assembly is forbidden to grant to any citizen or class of citizens, privileges, etc., which upon the same terms shall not equally belong to all citizens. In *Cate v. State*, 3 Sneed 120, it was said of the term "privilege" that "It means something which cannot be enjoyed without legal authority, generally a license." In *French v. Baker*, 4 Sneed, 193, the definition given is this: "Any occupation which was not open to every citizen, but could only be exercised by a license from some constituted authority." The right of selling groceries, or conducting other lawful business in connection with the sale of intoxicating liquors is manifestly a privilege which cannot be granted under like conditions to some citizens and refused to others. Whether the legislature can prescribe or impose conditions upon the sale of intoxicating liquors is not the question involved, but the point at issue is whether the law-making power can confer upon county commissioners authority to grant the privilege of conducting some other business in conjunction with that of selling liquors to some of the State's citizens and refuse it to others, where there is no difference in condition, situation or qualification. That which the legislature cannot do directly, it cannot authorize to be done indirectly through the agency of some local board. I think it is clear that the provision embraced in the proviso of section two is at least antagonistic to the section of

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the constitution above mentioned, and therefore void.

But it is insisted, by counsel for the State, that this part of the section may be adjudged void, and still full force and effect may be given to that portion of it which requires that the sale of the liquors shall be carried on in a room separate from any other business. I cannot concur with counsel in this view of the question. In *Griffin v. State, ex rel.*, 119 Ind. 520, it was said by this court: "It is undoubtedly the law that when the several provisions of an act are independent, some may stand although others may fall, but this occurs only when the provisions are clearly independent. As said by Shaw, C. J., in *Warren v. Mayor, etc.*, 2 Gray, 84, the rule that some portions of a statute may stand while others fall, 'must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other.'" In the appeal of *State, ex rel., v. Blend*, 121 Ind. 514, the rule was there asserted as follows: "It is quite well settled that where a part of a statute is unconstitutional, if such part is so connected with the other parts as that they mutually depend upon each other as conditions, considerations, or compensations for each other, so as to warrant the belief that the legislature intended them as a whole, and if they could not be carried into effect the legislature would not have passed the residue independently of that which is void, then the whole act must fall. Cooley Const. Lim. (5th ed.), 213; *Mesmeier v. State, supra*; *State, ex rel., v. Denny, supra*; *Griffin v. State, ex rel.*, 119 Ind. 520. On the other hand, it is equally well settled that when a part of a statute is unconstitutional, if by striking from the act all that part which is void, that which is left is complete in itself, sensible, capable of being executed and wholly independent of that which is re-

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jected, the courts will reject that which is unconstitutional and enforce the remainder. Cooley Const. Lim. (5th ed.), p. 178; *Clark v. Ellis*, 2 Blackf. 8; *Maize v. State*, 4 Ind. 342; *State v. Newton*, 59 Ind. 173; *Ingerman v. Noblesville Tp.*, 90 Ind. 393."

In *Meshmeier v. State*, 11 Ind. 482, the rule, and the reason by which it was upheld, was well stated by this court, per Worden, J. It was there said: "But it would seem that the provisions of the statute held to be constitutional, should be substantially the same, when considered by themselves, as when taken in connection with other parts of the statute held to be unconstitutional; or, in other words, where that part of a statute which is unconstitutional, so limits and qualifies the remaining portion, that the latter, when stripped of such unconstitutional provisions, is essentially different, in its effect and operation, from what it would be were the whole law valid, it would seem that the whole law should fall. The remaining portion of the statute, when thus stripped of its limitations and qualifications, cannot have the force of law, because it is not an expression of the legislative will. The legislature pass an entire statute, on the supposition, of course, that it is all valid, and to take effect. The courts find some of its essential elements in conflict with the constitution, strip it of those elements, and leave the remaining portion, mutilated and transformed into a different thing from what it was when it left the hands of the legislature. The statute thus emasculated, is not the creature of the legislature; and it would be an act of legislation on the part of the courts, to put in force. The courts have no right thus to usurp the province of the legislature.

"The statute in question prohibits the retail of spirituous liquors (save for the purposes herein named) except upon two conditions: *First*, the consent of the majority of the voters of the township who may cast

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their votes on that subject; and, *secondly*, giving bond and procuring a license.

“The condition respecting the vote, so enters into, qualifies, and forms a part of the prohibition, as to leave that an essentially different enactment, when stripped of such condition. The first condition qualifies the prohibitory feature as much as the second, and the law could as well be enforced with the second condition stricken out, as the first. In such case, the law would be purely prohibitory, and void, as has been held in reference to the statute of 1855. Suppose the condition in reference to giving bond and procuring license were void by the constitution. In such case, it will hardly be contended that it might be stricken out, and yet, that the balance would be substantially the same law, as when taken in connection with the part providing for bond and license. There is conceived to be no difference in principle between striking out the first and the second condition. They both, to a greater or less extent, enter into, and form a part of an entire provision. They are so blended with the entire enactment, that neither can be separated therefrom without destroying the harmony of the whole, and leaving the remaining portion to have an effect different from that shown by the whole law to have been the intent of the legislature. Upon this view of the statute, the case of *Washington v. State*, 8 Eng. (Ark.) 752, seems to be in point. The defendant was indicted for keeping a ten-pin alley without paying a license either into the State or county treasury. The court says:

‘For the reasons here set forth, we are bound to decide that so much of the act of the 8th of January, 1845, as prohibits any person setting up a billiard table or ten-pin alley without paying a sum of money into the State treasury as a license therefor,

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is repugnant to the constitution and void; because there is no power to do that indirectly which cannot be done directly; and the license is none the less a tax for the privilege of setting up such a table or alley, because collected or enforced by means of a criminal prosecution.

“The indictment in this case also contains a count for setting up and keeping a ten-pin alley, without first paying the sum of \$25.00 into the treasury of Jefferson county. Although our opinion is that the general assembly may constitutionally impose, or authorize the county court to impose, such tax by conferring on them the power to grant licenses as a means of raising revenue for county purposes; and although the payment of the sum specified would seem to be an implied license to exhibit the table or alley, yet the whole scope and provisions of the act are so intimately blended that we do not feel warranted by any rule of judicial interpretation to separate these provisions in order to give to a part of the act an effect we cannot presume was intended. The whole enactment must therefore stand or fall together.”

In Cooley's Const. Lim. (6th ed.), in a foot note on page 212, the rule is stated with much force as follows:

“It must be obvious, in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder that are allowable in support of a complete act when some cause of invalidity is suggested to the whole of it. In the latter case, we know the legislature designed the whole act to have effect, and we should sustain it if possible; in the former, we do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were held void, and there is generally a presumption more or less strong to the contrary. While,

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therefore, in the one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest the portion not opposed to the constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part which was void."

In the case of *Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601 (the Income Tax Case), on this point the court said:

"And in the case before us there is no question as to the validity of this act, except sections 27 to 37, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice Shaw in *Warren v. Charlestown*, 2 Gray, 84, is applicable, that if the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.' Or, as the point is put by Mr. Justice Matthews in *Poindexter v. Greenhow*, 114 U. S. 270, 304: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law

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intended by the legislature, one they may never have been willing by itself to enact.' And again, as stated by the same eminent judge in *Sprague v. Thompson*, 118 U. S. 90, 95, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: 'The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions.' "

The question is, can the invalid part of this section be eliminated and the remainder of it be enforced, or, in other words, is the void provision embraced in the proviso and that part of the section which forbids the sale of liquors in a room wherein other business is conducted, so distinctly separated and independent of each other that the latter can stand alone and thereby express the true intent of the legislature? I think that this question must be answered in the negative.

A proviso in a statute is said to be something engrafted upon a preceding enactment intended as an exception to it, or in some manner to modify it, and the general intent of the preceding provision will be controlled by the particular intent subsequently expressed. Its nature and appropriate office being to restrain or qualify some antecedent matter; it should therefore be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter, and it is to be construed with the preceding parts of the clause to which it is attached. This is said not to be an arbitrary rule to be enforced

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at all events, but is based upon the presumption that the meaning of the law-maker is thereby reached. Sutherland on Statutory Construction, sections 222 and 223. See also Potter & Dwarris on Statutes, pp. 117 and 118. The expression of the legislative will, in the first clause, whereby the licensed dealer in liquors is required to conduct the sale thereof in a room separate from other business, must be interpreted and construed with the subsequent expression of such will, as it is disclosed in the same section by the proviso to the effect that the board of commissioners may grant permission to said dealer to carry on other business in such room. If this *proviso* does not modify or create an exception to the first clause, then it must be presumed that the legislature enacted it for a useless purpose, and this a court is not authorized to do. On the supposition that this section as it came from the hands of the law-makers was valid in all respects, it may at least be suggested that in the event the State undertook to base a criminal prosecution thereon against a licensed retailer for failure to comply with the requirement to provide a room for the sale of his liquors in which no other business was conducted, under the rules of criminal pleading, it would be required to negative that he had been granted a permit as provided by said proviso. See *Brutton v. State*, 4 Ind. 602. And in the event the defendant had duly secured such a permit, and was the holder thereof at the time the alleged offense was committed, he undoubtedly, upon the trial, could introduce the same in evidence as a complete defense to such prosecution. Therefore, to hold that the invalid portion of this section may be stricken out and disregarded, and, that the other clause with which it is so closely and distinctly connected, can stand and be enforced, would evidently result in substituting for

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the law intended by the legislature one that they may never have intended to enact. This, courts are not permitted to do. Certainly, under the rule, to which I have herein referred, I am warranted in the presumption and belief that had the legislature supposed that the grant of power conferred on the board of commissioners, by the proviso which it had engrafted upon the clause in question, was invalid, it would not have adopted the prohibitory features of the section relating to the carrying on of other business in the same room. For the reasons given by the many authorities cited, I am of the opinion that the clause, or part of the section in controversy, must fall with that which in my opinion is invalid.

It follows, therefore, for the reason that this provision of the section cannot be rescued from that which is void, no prosecution can be based thereon, and the judgment in this appeal should, I think, be affirmed.

HACKNEY, J.—I give my consent to all of the constructions of the act in question, as concurred in by the majority, excepting that with reference to section two of said act. As to that section I do not believe it to have been designed to relate to the personal fitness of an applicant to sell intoxicants, and I am of opinion that, for the reasons stated by Jordan, J., the proviso of said section is unconstitutional.

WILSON ET AL. v. MATHIS.

[No. 17,792. Filed June 19, 1896.]

INTOXICATING LIQUOR. — *Application for License. — Appeal from Board of Commissioners.*—Where an application to the board of commissioners for a license to sell intoxicating liquors is dismissed,

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by virtue of the required remonstrance, an appeal will lie to the circuit court.

SAME.—Remonstrance.—Statute Construed.—Under section 9, Act of March 11, 1895, the remonstrance must be directed against a particular applicant; a general remonstrance would not be sufficient.

SAME.—Separate Remonstrances.—Voters may exercise the right to remonstrate by separate remonstrances, all directed against the same particular applicant.

From the Warren Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, and *Stearns & Ringer*, for appellants.

Stansbury & Stephens, for appellee.

JORDAN, J.—Appellee in this action was an applicant for license to sell intoxicating liquors, and appellants were remonstrators under section nine of the act of 1895 (Acts 1895, p. 248).

The questions which the appeal presents are: 1st, If an application to the board of commissioners for a license to sell intoxicating liquors is dismissed by the board, by virtue of the required remonstrance, under section nine of said act, will an appeal lie from this decision to the circuit court?

2d. Does section nine, *supra*, apply only to some particular applicant who is seeking a license?

3d. Must the names of the remonstrants all be signed to one written remonstrance, or may the voters exercise the right to remonstrate upon separate papers, of like import, and for the same purpose, all of which are filed within the prescribed time?

It has been held by this court that a proceeding, under the statute of 1875, to obtain a license to sell intoxicating liquors is a judicial proceeding. *Castle v. Belle*, ante 8, and cases there cited.

Section 7280, R. S. 1894, expressly grants an appeal to either an aggrieved applicant or remonstrator to the circuit court from a decision of the county commissioners in granting or refusing a license to retail

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intoxicating liquors We recognize nothing in section nine, *supra*, or any other of the provisions of the Act of 1895, which can be said to change, impair, or destroy this right which is expressly given under the section above cited. It follows, therefore, that it still exists, and that the first question presented must be answered in the affirmative. Section 7864, R. S. 1894, provides that every appeal taken from the board of commissioners to the circuit court, shall be docketed among other cases pending therein, and the same shall be tried and determined as an original cause. Under this provision of the statute, it has been frequently held by this court, that such appeal stands for trial *de novo* in the circuit court. *Hardy v. McKinney*, 107 Ind. 364.

We held, in the opinion in the case of *State v. Gerhardt*, ante 439, that when the board should find it to be an existing fact that the required remonstrance, under section nine, *supra*, had been filed in accordance with said section, that its further jurisdiction in the proceedings to obtain a license was ousted, and all it was authorized to do, under the law, was to dismiss the application. It is manifest, therefore, upon an appeal, that the same rule must control the circuit court. The first duty of the latter court, upon such an appeal would be—without the intervention of a jury—to ascertain, as preliminary to its jurisdiction, to hear the appeal in general, whether, under the evidence and the law relative thereto, the fact, namely, that the required remonstrance was filed three days prior to the first day of the session of the board at which the application was presented, existed.

If this fact is found to exist, the jurisdiction of the court, in like manner as is that of the board of commissioners, is terminated, and it can proceed no further, but must dismiss the application. But if,

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upon the contrary, the court finds (in the event the question is presented by the appeal) that such fact does not exist, it is then at liberty to proceed in the hearing of the appeal, in like manner as if no remonstrance had been filed, under the Act of 1895.

The second question was considered and settled in *State v. Gerhardt*, *supra*, and under the authority of that decision must be answered in the affirmative.

In *Flynn v. Taylor et al.*, *post* 533, it was held that the voters may exercise the right to remonstrate by separate remonstrances, all directed against the same particular applicant. This decision is decisive of the proposition involved in the third question.

For error of the court in sustaining the motion to strike out the remonstrance upon the grounds therein stated, the judgment is reversed.

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THE MERIDIAN NATIONAL BANK ET AL. v. HAUSER,
TREASURER, ETC.

[No. 17,122. Filed January 21, 1896. Motion to modify overruled June 19, 1896.]

TREASURER OF INSANE HOSPITAL BOARD.—*Parties.*—*Trustee of Express Trust.*—Payment is made to the treasurer of the board of trustees of the Central Hospital for the Insane by the Treasurer of State, upon an order issued by the Auditor of State, which order is based upon an itemized statement of specific claims allowed by said board of trustees. The money so paid to such treasurer is to be applied to the payment of such claims as designated, and until so applied may be deposited in bank and checks issued in favor of the claimants individually, or such treasurer may check same out to himself and pay the same to the proper parties, and the successor of such treasurer may maintain a suit for the recovery of the funds so deposited without joining with him the persons for whose benefit the suit is brought, such successor being the trustee of an express trust.

SAME.—*Assignment of Bank Deposits.*—It is not necessary for the treasurer of the board of trustees of the Central Hospital for the In-

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sane to make an assignment of funds deposited in bank by him as such treasurer to his successor in office, in order to authorize his successor to maintain a suit for the recovery of the amount so deposited, as such deposits vest in him by virtue of his succession to such office.

SAME.—In an action for the recovery of money deposited in bank by the treasurer of the board of trustees of an insane hospital it was no defense to the action that the preceding treasurer had given checks on the bank to the persons on whose claims he had collected from the State Treasurer the amount on deposit, the bank having refused to pay such checks.

ASSIGNMENT OF ERRORS IN SUPERIOR COURT.—*Amendment on Appeal to General Term.*—Where on appeal to the general term of the superior court, the assignment of errors did not contain the name of one of the parties plaintiff, it was not error on motion to dismiss such appeal on account of such omission, to allow the assignment of errors to be amended by inserting the name omitted.

From the Marion Superior Court. *Affirmed.*

A. C. Harris and L. Cox, for appellants.

W. A. Ketcham, Attorney-General, F. T. Edenharter, and H. N. Spaan, for appellee.

MONKS, J.—This action was brought by appellee, Hauser, as treasurer of the board of trustees of the Central Hospital for the Insane, against appellant, the Meridian National Bank, and one Philip M. Gapen, formerly treasurer of said board of trustees, who was made a party defendant to answer as to his interest.

The superior court, in special term, sustained the demurrer of the Meridian National Bank to each paragraph of the amended and supplemental complaint. Hauser, the plaintiff in the court below, appealed to the general term of the superior court, where the decision of the special term was reversed, with instructions to overrule the demurrer to each paragraph of the amended and supplemental complaint. From this decision the Meridian National Bank appealed to this court.

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The first of said paragraphs of the amended, substituted and supplemental complaint alleges that for a long time prior to the 20th day of February, 1889, Philip M. Gapen had been a member of said board of trustees and treasurer thereof, duly elected and qualified; that as such treasurer he, from time to time, received from the Treasurer of State large sums of money with which to pay claims for supplies and services against said board, and that these moneys were from time to time deposited with said bank, and from time to time checked out by said treasurer, and that up to said 20th day of February, 1889, his checks as such treasurer had always been promptly honored; that on said day there was due said Gapen, as such treasurer, a balance of \$3,043.66 of the moneys so deposited by him, and that there was due to divers and sundry parties, for work and labor done and materials furnished said board, a like sum of \$3,043.66, and that in order to pay said claims said Gapen, as such treasurer, drew his check, payable to his order as such treasurer, for said sum of \$3,043.66, but that said bank wholly failed and refused to pay the same; that immediately thereafter said Gapen, as such treasurer, brought a suit against said bank to recover said sum of \$3,043.66, to which said bank appeared and filed answer; that on the first day of March, 1889, said Hauser was by the general assembly elected one of the trustees for said Central Hospital, and was thereafter by said board duly elected treasurer thereof, as said Gapen's successor, and that he qualified, gave bond and entered upon the discharge of his duties as such treasurer, and has ever since continued therein; that, on the 26th day of January, 1891, on motion of the Attorney-General of the State, said Hauser was substituted as plaintiff in the place and stead of said

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Gapen, all parties to the suit being present and none of them making objection to such substitution.

The second of said paragraphs is the same as the first, except that it sets up in addition a formal written assignment of the cause of action from Gapen to Hauser, treasurer, a copy of which assignment is filed therewith.

The third of said paragraphs is the same as the second, except that it avers in addition that said Gapen, treasurer, prior to drawing and presenting a check to his order, as such treasurer, for said \$3,043.66, "as such treasurer, had drawn and issued to said parties, in whose favor such allowances had been made by said board of trustees, his checks upon said Meridian National Bank for the respective allowances so made, and had delivered the same to the said several parties, amounting in the aggregate to said \$3,043.66, and said parties had presented the same to said Meridian National Bank and had demanded payment thereof, but such payment had been refused upon each and every of said last named checks, and thereupon the said Gapen, as such treasurer, drew his check payable to his order, as such treasurer, and properly endorsed," etc., which was likewise refused.

The demurrer to each paragraph stated two grounds of objection.

1. That the plaintiff has not legal capacity to sue.
2. That said paragraph does not state facts sufficient to constitute a cause of action.

Appellant's contention is that appellee had no right to maintain this action; that the persons for the payment of whose claims Gapen, the former treasurer, had received the money from the State, were the real parties in interest, and they only could maintain an action for the money.

Appellee's contention is that the treasurer of the

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board of trustees is the trustee of an express trust, and as such can maintain this action.

Sections 2768-2782, R. S. 1881, being the act of March 6, 1879, governed the board of trustees of the hospital for the insane, until the passage of the act of February 21, 1883, Elliott's Supp. p. 132, sections 455-9. By this act, sections 2768, 2769, R. S. 1881, were repealed, but the remainder of the act of 1879 remained in full force. It was provided in section 2770, R. S. 1881 (section 3010, R. S. 1894), that the trustees and the president of the board should each give a bond, payable to the State, that they should organize by electing one of their number treasurer, one as secretary, and one as president.

Section 3012, R. S. 1894 (2772, R. S. 1881), provides that the trustees shall hold a meeting at about the close of each month, for the purpose of consultation and the transaction of current and incidental business, and "keep a record of these proceedings, and all money received and paid out, and all orders drawn or paid. That no money shall be paid out or expended except upon an itemized bill first presented and allowed by the board. Such bill shall be signed and sworn to by the claimant, and such payment shall be made by an order signed by the president and drawn upon the treasurer of the institution, payable ten days from the drawing thereof."

Section 3013, R. S. 1894 (2772, R. S. 1881), provides that "the treasurer shall, from time to time, before such orders become due, present to the Auditor of State a statement of all orders drawn and then unpaid, giving the date and number and amount of each order, and the person to whom payable, which shall be signed and sworn to by the treasurer and certified to by the president of the boards; and the Auditor of State shall thereupon draw an order for the amount,

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in favor of such treasurer, upon the Treasurer of State, who shall pay the amount out of any money in his hands subject to such payment. The Auditor of State shall open and keep an account with the treasurer of each of said institutions, and shall charge him with the orders so drawn upon the State Treasurer. The treasurer of said institutions shall, at the close of each month, return to the Auditor of State an itemized statement of the orders paid by him, and the amounts thereof, signed and sworn to as being correct, and, with such statement, shall return to the auditor the orders so paid; the Auditor of State shall thereupon credit the said treasurer with the amount so paid out by him, and shall carefully preserve all such orders and statements."

It is clear, from the sections quoted, that no money can be paid to the treasurer of the board of trustees of an insane hospital out of the State treasury until the hospital has actually received supplies or service, and the same has been allowed by the board of trustees and orders drawn on the treasurer of the board therefor, as required in sections 2772, 2773 (3012, 3013), *supra*. It is only when the provisions of said sections have been complied with that the Auditor of State is authorized to draw an order on the State Treasurer in favor of the treasurer of the board.

The board allows the claims for support and services when itemized and signed and sworn to by the claimant; and when a claim is allowed an order is drawn upon the treasurer of the board for the amount payable in ten days. Before the ten days expires, it is the duty of the treasurer to present a statement of the orders drawn and unpaid and giving dates, number and amount of each order, and for what drawn, and the person to whom payable, signed and sworn to by the treasurer and certified to by the president

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of the board. The Auditor of State, to the extent said orders are correct and a proper charge against the State, draws a warrant in favor of such treasurer on the Treasurer of State, who pays the amount thereof to the treasurer of the board.

This money is received by the treasurer of the board for the payment of the orders reported by him to the Auditor of State, and can be used by him for no other or different purpose. If he does use the same for any other or different purpose, he is guilty of embezzlement. Sections 1942, 1952, R. S. 1881 (sections 2019, 2030, R. S. 1894). Depositing the money in a bank in his name as treasurer of the board, subject to check by him as such treasurer, was not embezzlement, nor the violation of any law. The indebtedness of the State, however, was not discharged by the payment to the treasurer of the board. Such obligation was only discharged when the treasurer of the board paid the orders for the payment of which he received the money.

The money so paid to the treasurer of the board was to be applied to the payment of specific claims, designated and pointed out in his statement to the Auditor of State. Until so applied he had the right to the possession thereof, and was charged with diligence and good faith in the disbursement of the same to the persons for the payment of whose claims he had received the money. If the money was deposited in a bank, he could, as such treasurer, give checks to the persons, or check the money out to himself and pay the same to the proper person or persons. It would be the duty of the bank having such deposit to pay such checks, and any failure so to do would be a breach of the implied agreement upon which such deposits were made. When the treasurer of the board of trustees of the insane hospital in this State, as such treasurer, de-

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posits money in a bank, such bank is bound to know that the same is not his money, and that such deposit creates no indebtedness to such treasurer as an individual, but to him in his official or fiduciary character, and that such treasurer has no right or authority to use said money for any other purpose, or in any other way, than the payment of the identical claims reported by him to the Auditor of State.

The treasurer of the board gives a bond for the faithful performance of his duties; among those duties is that of disbursing the money received by him to the proper persons. He was entitled to the possession of the money that he might perform that duty. If he was entitled to the possession, that he might properly disburse the money, then he had the right to maintain an action against any person or corporation with whom he had deposited the same, in order that he might execute his trust, that is, pay the claims for the payment of which it was received, and return to the State the amount of any such claims as the State may have subsequently paid.

It is clear, we think, that if Gapen, the outgoing treasurer of the board, had converted the money to his own use, and refused to pay the same to his successor, Hauser, that such successor would have been the proper relator in a suit on his bond to recover the amount thereof. *Hiatt v. State, ex rel.*, 110 Ind. 472, and cases cited; *State, ex rel., v. Wilson, et al.*, 113 Ind. 501, and cases cited.

It necessarily follows, that if Hauser, as such treasurer, would have been the proper relator in such an action, then he was a proper party plaintiff in an action to recover the trust funds deposited in the bank. He had the right, and it was his duty, to recover the funds from any person who might have received the same, so that he could pay the specific

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claims against the State, for which the money had been paid to his predecessor, and repay to the State such claims, if any, as the State may subsequently have paid. He was the trustee of an express trust, and as such could maintain the action under the provisions of section 252, R. S. 1881 (section 252, R. S. 1894).

In *State, ex rel., v. Wilson et al., supra*, 503, this court held that a township trustee was the trustee of an express trust, and that either the township or the trustee was a proper relator in an action on the bond of a former trustee of the township. Certainly no one would claim, in case of the death or resignation of a township trustee that his successor should be appointed by the court under sections 2978, 2996, R. S. 1881 (sections 3400, 3418, R. S. 1894).

It is urged that the second paragraph is not sufficient for the reason that the written assignment of the cause of action from Gapen to Hauser, referred to and made a part of said paragraph, was never filed, and is not set out in the record. This action was not brought to recover on the assignment. The assignment of the cause of action stated by Gapen to Hauser was not necessary. The right to receive and pay out the amount of money on deposit to the persons for whom it was received was not personal to Gapen, but belonged to the treasurer of the board, and when Gapen's term of office expired the same passed to his successor and became vested in him. An assignment of the same was therefore unnecessary. But if an assignment were necessary, it was not essential that the same be filed with or made a part of the complaint. *Fordyce v. Nelson*, 91 Ind. 447, and cases cited; *Keith v. Champer*, 69 Ind. 477; *Treadway v. Cobb*, 18 Ind. 36; Thornton's Practice Code, note 2 to section 362.

The third paragraph alleges that Gapen had given

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each claimant a check on the bank for the amount of his claim and that payment thereof had been refused by the bank. This would not deprive appellee or his predecessor of the right to maintain this action. The fact that Gapen had issued checks against said fund, as alleged, could not be set up as a defense by said appellant after its refusal to pay the same. Appellee's duty is to collect the amount and pay the same to the proper parties. Appellant bank can protect itself if necessary by taking the proper steps and paying the amount, principal and interest, due on the claim sued upon into court, under the provisions of section 273, R. S. 1881 (section 274, R. S. 1894).

We think each paragraph of the complaint was sufficient to withstand the demurrer. As bearing upon the questions in this case, we cite *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Harrison, Rec.*, v. *Wright*, 100 Ind. 515, and cases cited, 50 Am. Rep. 805; *Weaver v. Trustees*, 28 Ind. 112, 120; *Milbank v. Jones*, 127 N. Y. 370; *Dix v. Akers*, 30 Ind. 431; *Com's of Sinking Fund v. Walker et al.*, 6 How. (Miss.) 143, 38 Am. Dec. 433; *Rinker v. Bissell, Trus.*, 90 Ind. 375; *Pomeroy's Remedies*, sections 172, 174.

The assignment of errors in the general term of the superior court did not contain the name of Gapen. Appellant bank moved the superior court in general term to dismiss the appeal for that reason, which motion was overruled, and appellee was permitted to, and did, amend the assignment of errors by inserting Gapen's name as an appellee. We think there was no error in this action of the court. It has been held by this court that appeals to the general term of the superior court are governed by the statutes concerning appeals to this court, but not that they are governed by the rules of this court. There is no statute concerning appeals to this court violated by any

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action or ruling of the general term. Neither is it shown that any rule of the general term was disregarded or set at naught.

The general term of the superior court did not err in reversing the judgment of the special term, with instructions to overrule the demurrer of the Meridian National Bank to each paragraph of the amended and supplemental complaint. There is no available error in the record.

The judgment of the general term is affirmed, with instructions to the special term of the superior court to overrule the demurrer of the Meridian National Bank to each paragraph of the amended and supplemental complaint, in compliance with the judgment of the general term.

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THE WINCHESTER ELECTRIC LIGHT CO. ET AL.
v. VEAL.

[No. 17,508. Filed Sept. 19, 1895. Rehearing denied June 19, 1896.]

OFFICER.—*County Treasurer.*—*Loaning County Funds.*—A county treasurer, who loans the county funds, in violation of section 2019, Burns' R. S. 1894 (section 1942, R. S. 1881), cannot maintain an action for the recovery of the same; although the county itself might maintain such action.

PUBLIC POLICY.—*Officer.*—*Loaning Public Funds.*—Where public funds are loaned by an officer, in violation of the statute, an action to recover the same cannot be maintained on the ground of public policy, when it does not appear, from the pleadings, that other interests than those of the parties to the contract are concerned.

REHEARING.—*Attorneys' Fees Part of Judgment.*—Where, pending the decision of the Supreme Court, the appellee assigns his judgment in the lower court, retaining an interest to the extent of his attorneys' fees, his petition for a rehearing will not be dismissed.

From the Randolph Circuit Court. *Reversed.*

J. W. Thompson, for appellants.

E. L. Watson, and *Cheney, Macy & Goodrich*, for appellee.

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HOWARD, C. J.—This was an action brought by the appellee upon two mortgage notes, executed by the appellant electric light company, as principal, and by the remaining appellants, directors of said company, as sureties.

Demurrers were sustained to several special paragraphs of answer to the complaint; and these rulings present the only question for our consideration.

Substantially the same state of facts is averred in each of the special paragraphs of answer, namely: that at the time the loan was made the appellee was county treasurer of Randolph county, and the money for which the notes were given was taken from the funds of the county treasury, and was illegally, by appellee as such treasurer, loaned to the appellant company, in violation of the penal statutes of the State, and hence cannot be recovered by him in this action.

The particular statute claimed to have been violated, section 2019, Burns' R. S. 1894 (1942, R. S. 1881), is as follows:

"Whoever being charged, or in any manner intrusted, with the collection, receipt, safe-keeping, transfer, or disbursement of any money, funds, securities, bonds, choses in action, or other property belonging to or under the control of the State or of any State officer, or belonging to or under the control of any county, civil or school township, city or town in this State, converts to his own use, or to the use of any other person or persons, corporation or corporations, in any manner whatever, contrary to law; or uses, by way of investment in any kind of property; or loans, either with or without interest; or deposits with any person or persons, corporation or corporations, contrary to law; or exchanges for other funds, except as allowed by law, any portion of such money, funds, securities, bonds, choses in action, or other property—is

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guilty of embezzlement, and upon conviction thereof, shall be imprisoned in the State prison not more than twenty-one years nor less than two years, fined not exceeding double the value of the money or other property embezzled, and disfranchised, and rendered incapable of holding any office of trust or profit for any determinate period."

It seems clear that, under this statute, the appellee, in loaning the money in his hands as county treasurer, was guilty of a felony.

It is hence argued that, having thus engaged in the commission of an act made criminal by the law of the State, the appellee is not in position to invoke the same law to aid him in the recovery of the money loaned; that by assisting him to make good his loan, the law would, in effect, be but abetting him in his wrongdoing. In other words, that the law cannot help the criminal to reap the fruits of his crime, but must leave him where it finds him; and the county can look only to the treasurer personally, and to his bondsmen, to make good any loss that may be occasioned to the treasury by the failure to recover the money so illegally loaned.

It is admitted that the plea here made by the borrower is not one of honor, but rather of bare legal right. "We accept and adopt," say counsel for appellants, "the language of Judge Worden, in *Rock v. Stinger*, 36 Ind. 346, where he says: 'We may remark, however, that the defense has nothing in it to commend itself to favorable consideration; but, notwithstanding this, it should prevail if the rigid law is with the defendants.'"

Counsel also quote from *Holman v. Johnson*, Cowp. 343, where it was said by Lord Mansfield: "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very

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ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. * * * No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

It is said, by counsel for appellee, that the ruling of the trial court in the case before us, was based upon the theory that the legal title to the money loaned was in the treasurer, and that consequently he had the right to loan and collect the same; and that in making such ruling the court below was but following the decisions of this court.

Counsel for appellants contends that these decisions were made before the enactment, in 1881, of the penal statute above set out, and that this court has not since that date held that the treasurer can loan the money in his hands, although it has held that the legal title to the money is still in the treasurer. *Harvey v. State, ex rel.*, 94 Ind. 159; *Rogers v. State, ex rel.*, 99 Ind. 218; *Rowley, Admr., v. Fair*, 104 Ind. 189.

It is to be noted, however, that these and other like decisions, though made since the enactment of the criminal statute in question, were not made with reference to that statute. Not until now, so far as we have been able to learn, has that statute been brought here for consideration; and now, for the first time, it becomes necessary to decide whether a contract made

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in violation of the statute is valid and enforceable between the parties.

Moreover, even as to the treasurer's title to the money loaned, the holding in the case of *Rowley v. Fair, supra*, is to the effect that such title is rather technical than substantial, and is acknowledged only for the better security of the funds, and not for the use or benefit of the officer himself.

In that case, the court, speaking by Judge Niblack, said:

"But the title of a township trustee in the money for which he is held accountable is only recognized to the extent that is necessary for the better preservation of the various funds which the money represents, and is, in fact, a legal title only in a technical and very limited sense. The equitable title to, and the beneficiary interest in such money is in the township, and in that view the money for which the trustee is liable upon his bond really belongs to the township."

It was accordingly held, in that case, that notes and other evidences of indebtedness which had been taken by a deceased township trustee for township moneys loaned by him were rightfully turned over to his successor in office, and did not belong to his administrator. See also *State, ex rel., v. Wilson*, 113 Ind. 501.

As to the suggestion, in that case, that such loaning of the township funds by the trustee was embezzlement, the court expressly refused to make any decision, saying that: "is a question not now, in any manner, before us, and concerning which we are not now called upon either to intimate or to decide anything."

In the case now under consideration, the appellee having violated an express statute in loaning the money in his hands as county treasurer, and the question being before us for decision, the holding must be that he can maintain no action based upon his own

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illegal act. This has been the invariable decision of all courts.

"There is, to my mind," said Chancellor Kent, in *Griswold v. Waddington*, 16 Johns. 438 (at p. 486), "something monstrous in the proposition, that a court of law ought to carry into effect a contract founded upon a breach of law. It is encouraging disobedience, and giving to disloyalty its unhallowed fruits. There is no such mischievous doctrine to be deduced from the books."

See further, *Madison Ins. Co. v. Forsythe*, 2 Ind. 483; *Siter v. Sheets*, 7 Ind. 132; *Daniels v. Barney*, 22 Ind. 207; *State, ex rel., v. Sims*, 76 Ind. 328; *Case v. Johnson*, 91 Ind. 477; *Louisville, etc., R. W. Co. v. Buck, Admr.*, 116 Ind. 566; *Leonard v. Poole*, 114 N. Y. 371; *Bowman v. Phillips*, 13 Am. St. Rep. 292; 1 Parsons Contracts, 458; Broom's Legal Maxims, 738.

But counsel for appellee finally contend that in cases such as that before us, public policy requires that, notwithstanding the violation of the statute, the contract, based upon such violation, should nevertheless not be declared void. Many authorities, also, including cases in this and other courts, are cited in support of such contention, among them, 1 Story Eq. Juris., sections 298, 300; 1 Pom. Eq. Juris., section 403, and notes; *Lester v. Howard Bank*, 3 Am. Rep. 211; *Deming v. State, ex rel.*, 23 Ind. 416; *Scotten v. State, ex rel.*, 51 Ind. 52; *State, ex rel., v. Levi et ux.*, 99 Ind. 77.

In these cases, however, other interests than those of the parties to the contracts were concerned; and it was to protect such other interests, and not for the benefit of those who had violated the law, that the contracts were enforced.

In *Lester v. Howard Bank*, *supra*, a Maryland case chiefly relied upon by counsel, the president of the bank had borrowed from its funds, contrary to statute.

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Recovery under the contract was enforced, not to shield the officials who had violated the law, but for the protection of the stockholders, depositors and other creditors of the bank.

In the Indiana cases cited, county auditors, in making loans from the school fund, had violated provisions of the statute. Public policy required that these contracts should be enforced, not in favor of the auditors, but for the protection of the school fund. It would have defeated the very purpose of the law to have done otherwise.

These cases are not analogous to the case at bar. Here the action was not brought in the name of the county, nor did the appellee pretend to sue in his capacity as county treasurer, even if such suit by him could in any case be maintained. Section 7820, R. S. 1894 (section 5735, R. S. 1881); *Vanarsdall v. State, ex rel.*, 65 Ind. 176; *Caldwell v. Board, etc.*, 80 Ind. 99. Neither is there anything in the record from which it can be known that the county was pursuing the funds belonging to its treasury or seeking to recover them from the appellants. No public interest in the result of this action is therefore shown, nor any reason why public policy would be served by a recovery on the contract sued on, in favor of the appellee.

We have no doubt that if the county were shown to be interested in the recovery of the money here sued for, it might, by the proper officers, have been admitted as a party plaintiff in the original action. In such case much of what is said by counsel, as also the authorities cited, would be in point to show that, on grounds of public policy, a recovery ought to be had on the debt sued on in favor of the county. The faults, or even crimes, of public officials ought not to be allowed to interfere with the right of the people, through their several municipal and political organ-

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izations, to recover the moneys raised from them by taxation, and wrongfully converted or misapplied by such officials. In whosoever custody the money of the county is found it may be reached for the benefit of the county. *Vigo Tp. v. Board, etc.*, 111 Ind. 170, 178.

The judgment is reversed, with instructions to overrule the demurrers to the special paragraphs of answer, and with leave, if desired, to amend the complaint or to file a new complaint, and to admit other parties plaintiff.

MONKS, J., did not participate in this decision.

ON PETITION FOR REHEARING.

HOWARD, J.—Appellee, having filed a petition for rehearing, we are first met with the motion of appellants to dismiss the petition for the reason, as claimed, that before the filing of the same, the appellee had ceased to have any interest in the judgment appealed from, having received large payments thereon, and having assigned and transferred, without recourse, the unpaid part thereof. A reference, however, to the certified transcript of payments made and of the assignment of the judgment shows that the appellee still retains some interest in the judgment, at least to the extent of his attorney's fees. The motion to dismiss must therefore be overruled.

The appellee has filed elaborate and earnest briefs in support of his petition for a rehearing of the appeal; but we are satisfied that no sufficient reason is shown why the conclusion heretofore reached by the court should be disturbed.

A good part of the principal brief is occupied with a discussion of the proper punctuation of the penal statute violated in this case. (Section 2019, R. S. 1894, section 1942, R. S. 1881.) Were we disposed to follow

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counsel in this matter, we might observe that the history of the enactment of the statute militates against the argument here made. Three of the most eminent legal minds of the State, Judge Frazer, Senator Turpie and Mr. Stotsenburg, on appointment of this court and in pursuance of the provisions of the statutes, were charged with the compiling and publishing of the revised codes of 1881, including the section in question. (Acts 1879, 192, Acts 1881, 605.) If those accomplished jurists were of opinion that any doubt rested on the interpretation to be given to the clauses relating to the loaning and to the depositing of public money, they resolved such doubt in favor of the interpretation which we have given; and by inserting a semi-colon instead of a comma between the clauses, showed that they understood that the phrase "contrary to law" applies to "deposits," and not to "loans;" that loans are prohibited absolutely, and deposits only when made contrary to law.

We can, however, see but little that is controlling in this matter of punctuation. If there were neither comma nor semi-colon between the clauses, the interpretation, as we think, could not be different. Taking the words as they stand in the original act and section (section 41 of the act concerning public offenses and their punishment, Acts 1881, 182), and we find it declared that whoever, whether State, county, or other public official, being charged with the collection, custody and disbursement of public funds, "converts to his own use, or to the use of any other person or persons, corporation or corporations in any manner whatever, contrary to law, or uses by way of investment in any kind of property, or loans either with or without interest, or deposits with any person or persons, corporation or corporations, contrary to law, or exchanges for other funds, except as allowed by

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law, any portion of such money," shall be guilty of embezzlement, etc. "Contrary to law," or an equivalent phrase, is here used three times; and in each case clearly, as we think, qualifies the clause with which it stands in immediate connection. See, as bearing on this matter of construction, *Am. Trust and Savings Bank v. The Guelder, etc., Mfg. Co.*, 150 Ill. 336, 342.

Refinements of punctuation are not needed here. Provided there be ordinary intelligence, it would seem that the language is so clear that he who runs may read and understand: An officer may not use the public funds by way of investment in any kind of property or business; neither may he loan such funds, either with or without interest; but such official is required to keep the public moneys in a safe place, ready to be paid over to the proper person whenever demanded; he may, therefore, provided he is not forbidden by law, deposit such money in a bank, subject to his check. A bank is usually a safe place to keep funds. It is true, that some risk is taken in making such deposits. The bank may fail, and the money be lost. The public official who deposits money in a bank must take that hazard; if the money is lost he shall make it good. But so long as there is no law against making such deposits he may exercise his judgment as to making them; and the making of such deposits will not subject him to the charge of embezzling the public funds in his charge. *Meridian Nat. Bank v. Hauser*, ante 496. The deposits, however, must be subject to check. Loans to a bank, whether as time deposits or on certificates, or secured by bank paper, or otherwise, are as obnoxious to the statute as like loans made to an individual or other corporation,

But, in any case, the argument of counsel would not be good. Even if the statute did forbid officials

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to deposit the public moneys in bank, still we should not for that reason be at liberty to overthrow the statute; but, on the contrary, must uphold it. Any action which the legislature in its wisdom may see fit to take for the preservation of the public funds must be sustained by the courts. As a matter of fact, there is one public official who is not allowed to deposit in a bank the funds in his custody. By section 7657, Burns' R. S. 1894 (section 5633, R. S. 1881), it is provided that "the Treasurer of State shall be required to use the treasury. * * * as the sole place for the deposit and safe-keeping of the moneys of the State, except as hereinafter provided." As to county treasurers, however, no such limitation has, as yet, been imposed; and they may undoubtedly deposit the money in their custody in bank, subject to check, if they deem best, and at their own risk, so long as the legislature enacts no law against it; but they cannot loan the money, either with or without interest, nor invest it in any kind of property. It is public money, the title being in the official only to the extent that he is required to account for it; and he is not authorized to use it for his own private gain.

While, therefore, the legislature might undoubtedly do as it has done in the case of the Treasurer of State, and forbid county treasurers, township trustees, and others, to deposit the public moneys in banks; yet, so far, it has not seen fit to do so. That body has undoubtedly considered that, in many cases, the banks are safer places of deposit than the vaults of the county treasurers; and has not, therefore, in any manner forbidden such deposits. Appellee, however, has little reason to discuss the statute from this point of view. He is not charged with depositing public moneys in banks, but with loaning the money for his own private gain. This he certainly cannot do.

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Nor was it simply to secure the public funds from loss that this statute was enacted. The official bonds required by law are presumed to be sufficient security for the money, in case of loss or misappropriation by the officers (but see Murfree Official Bonds, sections 649, 650); while the statutes against embezzlement are deemed to be ample to punish the crime, but, as said by the Supreme Court of Colorado, *In re Breene*, 14 Colo. 401, the purpose of the statute before us is wider and deeper than all that. It looks rather to the inauguration of a more healthful public policy. Private speculation in public funds by the official custodians thereof, is emphatically against good morals. "Its inevitable tendency is to corrupt political and official action, and degrade the public service."

The court will also, in the interpretation of this statute, take notice of sad chapters in the history of public officials who have been tempted to use the funds in their hands to enrich themselves or their friends, and have thus brought ignominy upon all concerned, ending often in state's prison, sometimes, too, in a death of shame. And although such exposure and disgrace might be avoided, and the money be forthcoming when called for, and that without impairment of the official's estate, leaving him, perhaps, even some ill-gotten gains; yet the tone of moral character in the community, having knowledge of such speculation in the public treasury, must inevitably be lowered, and the purity of official integrity clouded. Good citizenship, a clean administration of public affairs, the welfare of the official himself no less than the good of the public, all required of the legislature the enactment of this law.

The clauses of the statute, therefore, which were uppermost in the mind of the legislature, were those relating to private speculation in the public funds.

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The remaining clauses were no doubt inserted with a view of making the statute general in character, and to harmonize its provisions with those of other statutes relating to the subjects named. The essence of the law is, and the main purpose in passing it unquestionably was, to declare guilty of embezzlement any treasurer, trustee, or other custodian of public funds, who "uses" such funds "by way of investment in any kind of property," or who "loans" them, "either with or without interest."

What is said by counsel as to the right of the county to interplead and pursue the funds wherever found, while somewhat inconsistent, from appellee's point of view, has nevertheless been sufficiently considered in the original opinion. The right of the county to recover its funds is clear.

The petition is overruled.

MCCABE, J. dissents.

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[No. 17,678. Filed April 15, 1896. Rehearing denied June 19, 1896.]

PLEADING AND PRACTICE.—Set-off and Counter-claim.—Demurrer.—

The informality of a demurrer, which was sustained below, cannot be first asserted on appeal for the purpose of upholding answers in set-off and counter-claim, which are, in fact, insufficient.

CORPORATION.—Salary of Vice-President.—A vice-president of a banking corporation is not entitled to any compensation for performing the ordinary duties of his office in the absence of a governing statute, by law, regulation, or contract, providing therefor.

SAME.—Breach of Contract.—Amount of Recovery.—The breach of a contract by a bank to loan a party money at a specified rate of interest, does not entitle him to the difference between the interest on the amount borrowed at a stipulated rate, and that which he actually paid, unless he was unable to obtain money at the former rate from any other source.

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SAME.—Assignment of Contract.—The assignment of the interest of one of the parties in a preliminary contract between some of the incorporators of a bank, whereby they were to hold certain offices in the corporation at specified salaries, does not pass the claim of the assignor against the bank for the salary voted to him by the bank.

SAME.—Counter-claim.—*Slander Cannot be Made the Subject of, Against a Promissory Note.*—Slander, upon the credit of maker, cannot be made the subject of a counter-claim in an action upon a promissory note for borrowed money.

From the Sullivan Circuit Court. *Affirmed.*

McCullough & Spaan, W. S. Maple, and J. T. Hays,
for appellant.

J. S. Bays, and Chambers, Pickens & Moores, for appellee.

HACKNEY, C. J.—The appellee sued the appellant on a promissory note for \$10,000.00, executed by him to the latter and payable six months from the date thereof with interest at eight per centum per annum after maturity. To the appellant's amended two paragraphs of answer, one in the nature of a set-off and the other purporting to be in counter-claim, the lower court sustained the appellee's demurrer. Appellant declining to plead further judgment was rendered against him for \$11,395.66. The errors assigned by the appellant bring in question the action of the lower court in so sustaining said demurrer.

The first question discussed by counsel is as to the form of the demurrer and its sufficiency to challenge the pleadings here in review. The first specification of the demurrer was that the "first paragraph of answer does not state facts sufficient to constitute a cause of defense," and the second specification was that the "second paragraph of answer and counter-claim does not state facts sufficient to constitute a cause of defense or counter-claim." Upon the theory that set-off and counter-claim are special affirmative

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pleas, and are required to allege facts sufficient to constitute a cause of action against the complainant, counsel for appellant argue that the demurrer should have questioned the facts stated to have constituted a cause of action, and not a cause of defense. It can not be necessary to cite authority to support the proposition that the pleas in question were not defenses. The statute permits them to be pleaded as answers, R. S. 1894, section 350, but to be sufficient they must allege facts which would constitute a cause of action against the plaintiff. As said by Mr. Justice Worden, in *Campbell v. Routt, Admr.*, 42 Ind. 410, where the demurrer was on the ground that the pleading "did not state facts sufficient to bar the action, and did not 'state facts enough for a counter-claim,' * * * The first may be disregarded as inapplicable to the pleading, which was not in bar of the action. The second, that the pleading did not 'state facts enough for a counter-claim,' is one not known to the statute, and should perhaps be regarded as not raising any question as to the validity of the pleading. *Lane v. State*, 7 Ind. 426; *Tenbrook v. Brown*, 17 Ind. 410. The cause of demurrer should have been, that the pleading did not state facts sufficient to constitute a cause of action."

We do not stop to consider whether, in a case like the present, this rule should apply where the trial court, without question from the counter-claimant, has entertained the demurrer and has sustained it. It would seem that where the demurrer has been overruled, this court, in presuming in favor of the trial court's action, might reasonably conclude that such action had resulted from a decision upon the informality of the demurrer, and not upon the sufficiency of the pleading sought to be questioned. It would seem, also, that where the party whose pleading is thus attacked makes no question of the sufficiency

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of the demurrer, but proceeds upon the hypothesis that it properly raises the question of the sufficiency of his pleading, should not be permitted to raise the question for the first time upon appeal. To permit him to do so would often work a fraud upon the trial court and a hardship upon his adversary, while the rule we suggest would reach the merits of the question. This distinction and, possibly, new rule need not be invoked here since, if the pleas are affirmative and should be treated as required to plead causes of action and not of defense, their sufficiency may be raised for the first time in this court. *Campbell v. Routt, supra*. The sufficiency of pleas is raised by assignment of cross-error. If it shall be concluded that the pleas did not state a cause of action, the informality of the demurrer could not be asserted to uphold them.

In *Palmer v. Hayes*, 112 Ind. 289, it was said by Mitchell, J., speaking for the court: "It is urged that the demurrer to this answer was insufficient in form, and that it should have been overruled for that reason. If it should be conceded that the demurrer was informal, it would not follow that the ruling should be reversed on that account. The most that can be said is that a bad answer went out of the record upon an informal demurrer; or, in other words, that the court reached a correct conclusion in a manner not altogether formal." See also *Davis v. Green*, 57 Ind. 493; *Terre Haute, etc., R. R. Co. v. Pierce*, 95 Ind. 496; *Hildebrand v. McCrum*, 101 Ind. 61.

The plea of set-off sought to predicate a cause of action as upon *quantum meruit*, for the services, for several years, of a vice-president of the appellee, the account for which, it was alleged generally, had been assigned to the appellant.

In Thompson Comm. on the Law of Corp., Vol. 4, section 4682, the rule with reference to the question

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presented by this plea is stated thus: "The president of a corporation is always a member of its board of directors. In addition to his ordinary duties as a director, it is his function to preside at meetings of the board, and, together with the secretary, and by means of the corporate seal (where a seal is required), to authenticate the formal acts and contracts of the corporation. In respect of his right to compensation, he is subject ordinarily to the rule already stated with regard to *directors*: he is not entitled to any compensation for performing the ordinary duties of his office, unless the governing statute, or some by-law, regulation, resolution, or contract, to which his own vote was not essential, has given it to him. As the law does not imply an agreement to pay for such services, in order for him to recover compensation for them, he must at least show an antecedent, valid agreement to pay for them."

That the proposition stated in the text is correct we have no doubt, that it is well fortified by the decisions we know, and that the same rule applies to the office of vice-president, it is needless to suggest. See from the work just quoted, section 4380; *Loan Assn. v. Stone-metz*, 29 Pa. St. 534; *Cheeney v. Lafayette, etc., Co.*, 68 Ill. 570; *New York, etc., Co. v. Ketchum*, 27 Conn. 170; *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Kilpatrick v. Penrose, Bridge Co.*, 49 Pa. St. 118; *Butts v. Wood*, 37 N. Y. 317; *Hall v. Railroad Co.*, 28 Vt. 401, 406; *Bliss v. Matteson*, 45 N. Y. 22; *Dunston v. Imperial, etc., Co.*, 3 B. & Ad. 125; *Holder v. Lafayette, etc., Co.*, 71 Ill. 106; *Maux Ferry, etc., Co. v. Branegan*, 40 Ind. 361.

The second paragraph of answer, by way of counterclaim, alleged that one Wilson, in 1889, was anxious to enlist capital in the organization of a national bank at Indianapolis, of which bank he should be a salaried official; that the appellant then desired a re-

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liable source from which to borrow various large sums of money on reasonable time and with reasonable security; that appellant agreed with said Wilson to enlist in said enterprise a man of large capital and influence if, upon the organization of such bank, he, the appellant, should have the credit he so desired, from time to time for ten years, or as long as Wilson was a manager of the bank; that he did enlist the man, so promised, who, together with said Wilson and another, entered into a written contract, one of the considerations for which was the promise of said Wilson to the appellant as to said extension of credit, which said contract was to the effect that the said then parties thereto would severally procure certain subscriptions to the capital stock of the proposed bank; that one should become president, another vice-president and the third cashier of the proposed bank, at salaries stated, and that the parties thereto should "cast their votes as stockholders and directors, and use their influence to induce their friends to cast their votes in harmony with this agreement and for a board of directors that will faithfully carry it out." It was alleged that the appellee bank was organized pursuant to said arrangement, and the three persons mentioned were elected to the offices contemplated and "under the plan and arrangement aforesaid," and the "said contract as to salaries, as well as said agreement for the rights of" the appellant, were, by the appellee "fully ratified and confirmed," and the appellant's "rights * * under and pursuant to the contract" were recognized, and said Wilson has ever since been connected with the management of said bank. It was alleged also that in pursuance of said arrangement the appellee had several times loaned money to him in various sums.

The pleading then alleged in detail six supposed

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breaches of the agreement between Wilson and the appellant, two of which are upon assignments, covering different periods, of the interest of said vice-president in the written contract above referred to and which are treated as carrying a claim for services performed by such vice-president in the sum of \$11,000.00. In view of what we have already said with reference to the sufficiency of the first paragraph, or set-off, we are unable to observe how the appellant could predicate a valid claim for the salary of the vice-president upon the contract between Wilson and others, as aforesaid. The assignments do not purport to carry any interest or demand beyond that arising upon said written contract. It is not alleged that by any corporate action a salary was provided for the appellee's vice-president, and if it had been so provided, the assignment of the preliminary contract would not carry it over to the appellant, since that contract, though it in terms specified what salary should be voted to the vice-president, it did not create the salary, nor purport to do so. Under this pleading it may be possible that by corporate action such salary was provided, but the assignments in question would not give the appellant an interest therein.

One of the breaches alleged was that as a part of said preliminary agreement, between the appellant and Wilson, the appellant was to obtain a loan from the prospective bank, at six per cent. interest, for the purpose of paying for his stock in said bank to be by him subscribed; that said agreement was ratified by the bank, and for a time was carried out, but that ultimately he was required to pay appellee eight per centum instead of six, to his loss in the sum of \$1,000.00. It is alleged that in pursuance of the same agreement as to loans to meet subscriptions to the capital stock of the bank, he and another purchased

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stock from a third at the par value of \$21,000.00, and that he obtained the money from the appellee, at six per cent. interest, to pay for his interest in the stock so purchased; that after a time, appellee required eight per centum instead of six, as agreed, and by reason of that fact appellant was obliged to sell \$9,000.00 of his stock at the sacrifice of \$2,500.00, and lost on account of such excess in interest \$1,000.00.

The pleading does not disclose, and we are at a loss to determine how the difference in the rate of interest on the two loans just mentioned was collected, except by the agreement of the appellant, nor do we observe how that loss became necessary, unless he was unable to obtain the money at six per cent. elsewhere, a fact not pleaded; nor do we understand upon what theory the appellee could become chargeable with the sacrifice upon the stock sold. If the money market had been closed against him, or if to borrow money elsewhere he would have been obliged to pay over twenty-five per centum, the sacrifice on the stock sold, facts of which we are not advised by the pleading, the appellee's claim for eight per centum upon the loan would not have enforced the sale and the sacrifice, but if the money market was open to him the losses need not have occurred. It will be observed that the alleged breaches, thus far disclosed, connect themselves with the preliminary contract, that of the promoters of the banking organization, but that they have no relation whatever to the note sued upon. The frequent general allegations of "ratification by the plaintiff" have reference only to the contract of the promoters.

It is further alleged that the note in suit was given for money borrowed to buy bonds of the St. Louis, Indianapolis & Eastern Ry. Co., and was borrowed upon the faith of said preliminary agreement with Wilson, understood by the parties to said written contract and

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ratified by the bank, and that said note was renewed seven months after its execution, for a period of six months. Facts are then alleged against the appellee constituting slander upon the credit of the appellant, and consisting of alleged false, malicious and willful statements that he was insolvent, also in sending said notes to the banks of the town of his residence and business for collection, with statements that he would be sued upon it, and caused the note to be exhibited to others to whom he sustained confidential business relations; that it caused the various mercantile agencies of the country to publish the fact that he had been sued upon said note; all for the purpose of preventing him from obtaining surety for another renewal of said note, to his injury in the sum of \$10,000.00, and to the injury of his local business in the sum of \$5,000.00.

This alleged breach is sought to be connected with both the preliminary agreement between Wilson and the appellant and the note in suit.

With reference to all of the alleged breaches, it may be said, as was said in *Standley v. Northwestern, etc., Co.*, 95 Ind. 254: "A counter-claim is that which might have arisen out of, or could have some connection with the original transaction, in view of the parties, and which, at the time the contract was made, they could have intended might, in some event, give one party a claim against the other for compliance or non-compliance with its provisions." The statutory definition is that "A counter-claim is any matter arising out of or connected with the cause of action," etc. R. S. 1894, section 353. Again it is referred to in the statute as "a counter-claim arising out of the contract, or transaction set forth in the complaint as the ground of the plaintiff's claims." R. S. 1894, section 354.

In *Miller, Admr., v. Roberts*, 106 Ind. 63, this court

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said: "Under these statutory definitions, it is very clear, as it seems to us, that any matter, which is pleaded as a counter-claim, must either arise out of, or be connected with, the contract or transaction set forth in the complaint as the ground of the plaintiff's claims."

In *Douthitt v. Smith, Admr.*, 69 Ind. 463, it was held that the matter set up in the counter-claim must relate to the matter in question in the complaint, and must not introduce a distinct matter, as it is but auxiliary to and dependent upon the original suit. There the plea of counter-claim sought to introduce matters belonging to a jurisdiction differing from that to which the plaintiff's cause belonged, and that fact was suggested as illustrating the conclusion that the two subjects were disconnected.

In the case at bar, all of the matters alleged in the counter-claim, excepting the tort, are wholly foreign to the subject-matter of the suit, and it would be the merest subterfuge to permit the preliminary contract with Wilson to furnish the connecting thread. As to those matters, it can only be said that because Wilson agreed that when the bank should be organized the appellant should have accommodations which were favorable; and that he had accommodations, bearing no relation to the note sued upon, and about which the bank did not treat him fairly. Those accommodations and the treatment connected with them have not even remote connection with the subject-matter of the present suit, and, when the note in suit was executed, could not have been intended in any event to give the appellant a claim. See also *Williams v. Boyd*, 75 Ind. 286; *McMahan v. Spinning* 51 Ind. 187; *Shelly v. Vanarsdoll*, 23 Ind. 543.

It is difficult, if not impossible, to observe how the clearly expressed terms of the contract in suit, the

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note, can be so far impaired by the alleged previous parol agreement as to give rise to any item of the counter-claim pleaded. Whatever that agreement, and though it had some relation to the note in suit, it was certainly superseded by the definite and unambiguous promise and obligation of the appellant. Though that agreement had the effect to insure him a loan for the \$10,000.00, he obtained the loan on terms by him agreed to in the note itself. The terms so agreed to, have been broken by him, and he seeks to meet that breach by setting up violations by the appellee on other occasions, and with reference to other and like transactions of said parol agreement. But, with reference to the parol agreement, as connected with the preliminary written contract, which must be relied upon to connect all of the transactions pleaded in the counter-claim, excepting, possibly, the tort, it may be suggested, though it is unnecessary to decide the question, that it was of doubtful validity. Its effect was to combine the votes and influence of the parties to it for the election of particular officers, upon particular salaries, which officers were pledged in advance to make the appellant a favored creditor of the bank without regard to the state of the money market, the obligations of the bank, or the interests of its stockholders. Such a contract does not commend itself to the demands of public policy. Its tendency, if not its direct result, is to foist upon the stockholders officers not desired; to take from the assets moneys for salaries not earned; to deny to the officers, in the business transactions of the bank, that freedom of judgment and impartiality of action necessary to successful results. Contracts having such tendencies have generally, if not universally, been held void. *Bliss v. Matteson, supra*; *West v. Camden*, 135 U. S. 507; *Fuller v. Dame*, 18 Pick. (Mass.), 472; *Bollman v. Loomis*,

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41 Conn. 581; *Guernsey v. Cook*, 120 Mass. 501; *Woodruff v. Wentworth*, 133 Mass. 309; *Lum v. Clark* (Minn.), 57 N. W. Rep. 662; 1 Redf. Railways, section 140; Bishop Contracts, section 525; Thompson Corp., Vol. 4, section 4682; 9 Am. and Eng. Ency. of Law, 916; *Noel v. Drake*, 28 Kas. 265, 42 Am. Rep. 162.

In this view of the question it may well be doubted if "ratification" by the appellee was ever possible. It is little enough, however, that one pleading the ratification by a corporation, of such a contract, be required to plead such facts as may disclose a knowledge of the terms of the pre-existing contract, and an action upon that knowledge by others than the very officers whose contract it is.

The element of the counter-claim so alleging tortuous conduct on the part of the appellee, for the reasons already stated, receives no strength from the contract between the appellant and Wilson, or that between Wilson and others. The naked question remaining is this: Can slander be the subject of counter-claim in an action upon a promissory note for borrowed money? In our judgment it cannot. See *Conner v. Winton*, 7 Ind. 523; *Slayback v. Jones*, 9 Ind. 470; *Roback v. Powell*, 36 Ind. 515; *Harris v. Rivers*, 53 Ind. 216; *Zeigelmueeller v. Seamer*, 63 Ind. 488; *Avery v. Dougherty*, 102 Ind. 443; *West v. Hayes*, 104 Ind. 251; *Richey v. Bly*, 115 Ind. 232.

In *Conner v. Winton*, *supra*, the action was for money deposited, and the counter-claim alleged that plaintiff had falsely charged the defendant with stealing the money so sued for. This court said: "The question is, what is the legal effect of the words 'arising out of or connected with?' Do they refer to those matters which have an immediate connection with the transaction, or do they include, also, those which have a re-

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mote relation to it, by a chain of circumstances which were not had in view in its inception? Suppose *Conner* had beaten *Winton* for uttering the slander, could *Winton* have replied the damages occasioned by the battery to those resulting from the slander, and could the parties have settled all their quarrels in the action to recover the money? We do not think the statute contemplates any such practice. A counter-claim is that which might have arisen out of, or could have had some connection with the original transaction, in view of the parties, and which, at the time the contract was made, they could have intended might, in some event, give one party a claim against the other for compliance or non-compliance with its provisions." Here is found the definition of counter-claim already quoted from *Standley v. Northwestern, etc., Co., supra*, and it supplies the unanswerable conclusion that tort can not be a basis of counter-claim against contract. *Slayback v. Jones, supra*, illustrates the rule that tort can not be regarded as growing out of or connected with contract, within the meaning of the statute, simply because the contract had suggested it or was remotely an incident to it.

In our opinion, the answers were both bad, and that the trial court did not err in its ruling.

The judgment is affirmed.

THOMPSON v. HIATT ET AL.

[No. 17,839. Filed June 19, 1896.]

LIQUOR LICENSE. — *Remonstrance*. — *Statute Construed*. — A remonstrance against granting a liquor license under section 9, Act of 1895 (Acts of 1895, p. 248), directed against "John W. Thompson or any applicant," is against John W. Thompson; the words "or any applicant" may be rejected as surplusage.

Collins v. Marvil et al.

From the Jay Circuit Court. *Affirmed.*

J. M. Smith, Walker & Garrett, Lamb & Beasley, Baker & Daniels, Elliott & Elliott, Zollars & Worden, S. R. Hmill, and Stuart Bros. & Hammond, for appellant.

W. A. Ketcham, Attorney-General, C. E. Wiltsie, Duncan, Smith & Hornbrook, LaFollette & Adair, E. F. Ritter and F. E. Matson, for appellees.

JORDAN, J.—The only question, if any, that may be said to be properly presented by the record herein is, that of the right of remonstrators to withdraw their names from a remonstrance against granting a liquor license, under section nine of the Act of 1895 (Acts of 1895, p. 248), after the period of limitation for filing such remonstrance has commenced to run. This right to withdraw, under such circumstances, was denied in the case of *State v. Gerhardt*, ante, 439, and is controlling in this appeal. Some complaint is made by the appellant that the remonstrance herein was general, and was not directed against him alone, for the reason that it read against "John W. Thompson or any applicant." We think, however, that the remonstrance may be said to be against John W. Thompson, and, as there was no legal authority for inserting the words "or any applicant," they may be rejected as surplusage.

There is no error shown by the record, and the judgment is affirmed.

COLLINS v. MARVIL ET AL.

[No. 17,827. Filed June 19, 1896.]

LIQUOR LICENSE.—*Christian Name.—Remonstrance.—Name of Remonstrator.—Statute Construed.*—A remonstrator under section 9, Act of 1895 (Acts of 1895, p. 248), may employ initials to indicate his Christian name in subscribing a remonstrance against the granting of a liquor license, provided he write his surname in full.

145	531
161	398
145	531
164	323
145	531
167	466

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From the Gibson Circuit Court. *Affirmed.*

L. C. Embree, Lamb & Beasley, Baker & Daniels, Elliott & Elliott, Zollars & Worden, S. R. Hamill, and Stuart Bros. & Hammond, for appellant.

W. A. Ketcham, Attorney-General, *T. R. Paxton, M. M. Fields, C. E. Wiltsie, E. F. Ritter, Duncan, Smith & Hornbrook* and *F. E. Matson*, for appellees.

JORDAN, J.—The questions presented by this case have been decided adversely to the contentions of appellant, in the opinion of this court in the appeal of *State v. Gerhardt*, ante, 439, with one exception, which is the contention herein of appellant that the law does not permit a remonstrator, under section nine of the Act of 1895, (Acts of 1895, p. 248), to use only the initials of his Christian name in signing a remonstrance against granting a license to an applicant to sell intoxicating liquors. This claim as made by appellant cannot be sustained.

In the case of *State, ex rel., v. Beck*, 81 Ind. 500, it was held that articles of association for a turnpike company may be subscribed by the corporators by their usual signatures, and that the use of initials to designate their Christian names is not objectionable. See *Wassels v. State*, 26 Ind. 30; *Vanderkarr v. State*, 51 Ind. 91.

It is always better, perhaps, for a person, in subscribing his name to any document, to write the first part of his Christian name in full, as well as his surname. We think, however, that a remonstrator, under section nine, *supra*, may be permitted to employ initials to indicate his Christian name, in subscribing a remonstrance, provided he write his surname in full.

There is no error shown in this appeal, and the judgment is affirmed.

 Flynn v. Taylor et al.

FLYNN v. TAYLOR ET AL.

[No. 17,861. Filed June 19, 1896.]

INTOXICATING LIQUOR.—*Remonstrance.—Time of Filing.—Statute Construed.*—A remonstrance to the granting of a license to sell intoxicating liquors, filed on Thursday next preceding the Monday on which the session of the board of commissioners commenced, is in time, under section 9, Act of March 11, 1895, requiring same to be filed three days before the session.

SAME.—*Remonstrance.—Several Remonstrances May be Considered as One.—License.*—Several copies of a remonstrance to the granting of a license to sell liquor, each of which is signed by different voters and filed as a remonstrance, will be considered as only one remonstrance.

SAME.—*License.—Remonstrance.—Constitutional Law.*—Section 9, Act of March 11, 1895, allowing a majority of the voters of a township or ward by remonstrance to prevent the granting of a license to sell intoxicating liquors, is constitutional.

From the Vermillion Circuit Court. *Affirmed.*

F. F. James, for appellant.

Conley & Sawyer, for appellees.

MONKS, C. J.—Appellant, after giving the notice required by law, filed in the auditor's office of Vermillion county, on August 31, 1895, his application for a license to sell intoxicating liquors in a less quantity than a quart at a time, at Dana, Holt township, of said county. On Thursday, August 29, 1895, there was filed with the said auditor, a remonstrance under section nine of an act approved March 11, 1895, Acts 1895, p. 251, commonly called the Nicholson law, against granting a license to said appellant, which remonstrance, it was claimed, was signed by a majority of the voters of said Holt township.

The board of commissioners found that said remonstrance was signed by a majority of the voters of said

145	533
145	496
145	609
146	65
146	613
145	533
156	381
145	533
158	343
145	533
159	501
159	502
145	533
180	376
145	533
162	687
145	533
169	193

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township and refused to grant a license to appellant for that reason, as required by said section nine, Acts 1895, p. 251.

Appellant appealed to the circuit court, and that court refused to grant a license for the same reason.

The first question presented for our decision is: When is the last day upon which a remonstrance may be filed under section nine of the act approved March 11, 1895, commonly known as the Nicholson law? Said section nine provides, that "If, three days before any regular session of the board of commissioners of any county, a remonstrance in writing, signed by a majority of the legal voters of any township or ward in any city situated in said county, shall be filed with the auditor of the county, against the granting of a license to any applicant for the sale of of spirituous, vinous, malt or other intoxicating liquors under the law of the State of Indiana, with the privilege of allowing the same to be drunk on the premises where sold within the limits of said township, or city ward it shall be unlawful thereafter for such board of commissioners to grant such license to such applicant therefor during the period of two years from the date of the filing of such remonstrance. If any such license should be granted by said Board during said period, the same shall be null and void, and the holder thereof shall be liable for any sale of liquors made by him the same as if such sale were made without license. The number to constitute a majority of voters herein referred to shall be determined by the aggregate vote cast in said township or city ward for candidates for the highest office at the last election preceding the filing of such remonstrance."

The remonstrance in this case was filed Thursday, August 29, 1895, and the regular September session of

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the board of commissioners commenced Monday, September 2, 1895.

In case a statute requires an act to be performed a certain number of days before a time named, the general rule is to include one day of the period and exclude the other. *Krohn v. Templin*, 2 Ind. 146; *Womack v. McAhren*, 9 Ind. 6; *Catterlin v. City of Frankfort*, 87 Ind. 45; *Towell v. Hollweg*, 81 Ind. 154, and cases cited.

Section 1280, R. S. 1881 (section 1304, R. S. 1894), provides that the time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last.

Section 516, R. S. 1881 (section 524, R. S. 1894), requires that summons be served on the defendant ten days before the first day of the term of court; and this same provision was in the revisions of 1843, 1838 and 1831. Under these several statutes it was held that service on Friday of the week before the court was sufficient. *Womack v. McAhren*, *supra*.

This was the construction of such statute before the enactment of section 1280 (1304), *supra*, in regard to the rule computing time. This court, in *Womack v. McAhren*, *supra*, in speaking of said last named statute, said: "Nor does the statutory rule of excluding the first day and including the last, make any difference. That was the law long before the statute was enacted. Indeed, the statute was but enacting the decision of the Supreme Court. Thus, that the day of the service was to be excluded, was expressly decided in *Krohn v. Templin*, 2 Ind. 146. * * * But even before the adoption of the new rule of computation, as announced in 2 Ind., *supra*, a service on *Friday*, to appear on the *Monday* week following, was always considered a good ten days' service."

It is not necessary to determine, in this case, whether the first or last day is to be excluded, for the

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reason that the result is the same either way, the last day is Friday before Monday, the first day of the session of the board. For the same reason it is not necessary to determine whether section 1280 (1304), *supra*, controls the computation of time in this case. As the remonstrance in this case was filed on Thursday, August 29, 1895, it was in time, and if filed on the next day, Friday, August 30, it would have been in time.

It appears from the record that ten copies of a remonstrance were prepared, and that they were all signed by the voters of said township, each voter, however, signing but one of said copies. These ten papers, so signed, were attached together and filed as a remonstrance in this case. Said ten copies, filed as stated, were signed by a majority of the legal voters of said township, but no one of said copies by a majority of said voters.

Appellee earnestly insists that there were ten different and separate remonstrances, while the law only permits one. We think that when filed the instruments constituted but one remonstrance. If each voter signed a separate remonstrance under section 9 of said act, against granting a license to any applicant, and they all were filed within the time required, they would constitute but one remonstrance under said section, and if signed by a majority of the voters of the township or ward, the board of commissioners would have no jurisdiction to act in said case, or grant a license to such applicant for two years from the date of filing said remonstrance. A license granted after such remonstrance is filed, is, under the provisions of said section nine, null and void, and no protection whatever to the person receiving the same.

Under the statutes in this State, requiring the signatures of a certain per cent. or number of the voters or other persons to a petition or remonstrance as

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affecting the jurisdiction or power of the board of commissioners to act, it seems to have been the general practice to have as many copies of such petition or remonstrances as was deemed necessary, each signed by different voters or persons, and that when filed they constituted one petition or remonstrance. See *Modc v. Beasley*, 143 Ind. 306.

It is also urged that section nine of said act is unconstitutional. This question has been decided adversely to appellant's contention in *State v. Gerhardt*, *ante*, 439.

Judgment affirmed.

THE STATE v. THE UNION NATIONAL BANK OF
MUNCIE, INDIANA ET AL.

[No. 17,990. Filed July 17, 1896.]

145	537
150	28
152	537
145	537
154	296
145	537
157	296

RECEIVERSHIP.—Appeal.—Practice.—Statute Construed.—Where, after the appointment of a receiver, a judgment creditor appeared by attorney and asked and was permitted to intervene and move to set aside the order to appoint a receiver, and to dismiss the proceedings, and afterward filed an intervening petition to set aside such order and proceedings, which petition was by the court denied, and a motion for a new trial filed and overruled, an appeal from such rulings to the Supreme Court was in substantial compliance with section 1245, Burns' R. S. 1894 (1231, R. S. 1881). *p. 544.*

145	537
168	487

SAME.—Jurisdiction of Defendant.—Appearance by Non-resident Attorney.—In an action for the appointment of a receiver, where no summons was issued or publication made against the defendant, an answer written and filed by plaintiff's attorney, signed by a non-resident attorney who was not admitted to practice law in the court where the cause was pending, purporting to appear for the defendant to the action, will not constitute a legal appearance so as to confer jurisdiction, and such proceeding was without jurisdiction and void. *p. 545.*

SAME.—Action for Appointment of Receiver.—When Not Authorized.—Statute Construed.—Receivers are appointed under the provisions of section 1236, Burns' R. S. 1894 (section 1222, R. S. 1881), in cases where there is an action already pending between the parties. The

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appointment of a receiver for an individual at the instance of a creditor, not in an auxiliary proceeding but upon a complaint in which the appointment is the sole relief sought, is not authorized either by statute or by common law. *p. 550.*

SAME.—*Appointment of Receiver.—Jurisdiction of Property.*—If the appointment of a receiver to take possession of the property of an individual upon the complaint of the holder of a chattel mortgage were proper, such appointment could only be for the property covered by the mortgage, and could not include other property. *p. 550.*

From the Delaware Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, *C. A. Korbly* and *W. H. Watson*, for appellant.

Ryan & Thompson, for appellees.

HOWARD, J.—In May, 1896, and for a long time previous thereto, the appellee, Alexander G. Patton, was a resident of Columbus, in the state of Ohio, and was engaged in the business of manufacturing, under the name and style of the Alexander G. Patton Manufacturing Company. He had one factory at Columbus, Ohio, one at Muncie, Indiana, and one within the Indiana Prison South, at Jeffersonville.

Prior to Saturday, May 16, 1896, the State of Indiana had a suit pending in the Floyd Circuit Court against said appellee, and on said day there was a finding by said court in favor of the State in the sum of \$28,242.62. Judgment was entered on this finding on May 19, and execution thereon issued on May 20, which execution came into the hands of the sheriff of Delaware county on May 21, 1896.

On Sunday, May 17, 1896, the appellee, Patton, at Columbus, Ohio, learned of the finding against him in the Floyd Circuit Court, and also that judgment had not as yet been rendered upon the finding. Early Monday morning chattel mortgages on the property at Muncie and Jeffersonville were prepared and executed by Patton. Those upon the Muncie property

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were at once sent on to that city by Wilden E. Joseph and L. L. Rankin, bookkeeper and attorney respectively for Patton, while Patton himself went to Jeffersonville.

The Union National Bank of Muncie, one of the appellees, held four promissory notes against Patton, and it was to secure this indebtedness that one of the chattel mortgages was intended. On the advice of counsel, renewal notes were made out for three of the old notes and the time extended. The remaining note was already sufficiently secured, and the bank preferred not to include that in the new notes to be secured by the mortgage. The bank had not expected to receive any mortgage as security for its indebtedness but, after learning the situation, accepted the mortgage and then believed its debt secure.

Afterwards the cashier of the bank was called up and informed that it was thought better that a receiver should be appointed for the Patton property, and that the bank should make the application. Thereupon Ryan & Thompson, attorneys, who acted in relation to the matter of the renewal notes and chattel mortgage, were directed by the bank to go ahead and procure the appointment of a receiver for Alexander G. Patton.

The complaint for a receivership was then, on said 18th day of May, 1896, prepared and filed by said attorneys, the material parts of said complaint being as follows:

“STATE OF INDIANA, }
COUNTY OF DELAWARE. } ss.

“UNION NATIONAL BANK OF MUNCIE }
v. }
ALEXANDER G. PATTON.

“The plaintiff complains of the defendant, doing

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business under the name and style of Alexander G. Patton Manufacturing Company, and says; said defendant, on the 18th day of May, 1896, by the name of Alexander G. Patton, executed and delivered to said plaintiff his certain chattel mortgage on the following personal property, situate and located in Delaware county, Indiana, to-wit: (describing the property) to secure the payment of three notes of the date of May 18, 1896, executed by said defendant by the name of Alexander G. Patton, and payable to the order of the Union National Bank of Muncie, Indiana, plaintiff; one of which said notes is for the sum of \$214.00, due June 17, 1896, with eight per cent. interest from date; one for \$1,410.48, due July 17, 1896, with interest at 8 per cent. from maturity; and one for \$1,513.00, due October 18, 1896, with 8 per cent. interest after maturity; all providing for the payment of attorney's fees, and payable without any relief from valuation and appraisement laws, a copy of which is filed herewith, marked "B," and made a part hereof. And which said notes are renewals and similar notes for similar and the same amounts.

"Plaintiff avers that said indebtedness is for loans of money from said plaintiff, borrowed for and used in the operation of the business of said company.

"The plaintiff avers that in the taking of said mortgage security aforesaid, plaintiff learned that there already existed a mortgage in full, which by its terms covered some parts and portions of the above mortgaged property, and that the property herein described as covered by the mortgage is inadequate to and wholly insufficient to secure the payment of said plaintiff's debts.

"That on this day, for the first time, plaintiff has learned said defendant is in imminent danger of insolvency; and plaintiff believes, from information se-

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cured by it this day, said defendant is insolvent and unable to pay his indebtedness.

"The plaintiff is informed that the defendant is indebted, in the sum of fifty or sixty thousand dollars, to a large number of creditors in various amounts, and is on the verge of being sued in numerous cases for parts of said sum, and writs will be levied, and much of said property will be wasted and dissipated.

"And plaintiff avers that it has just learned that the State of Indiana has recovered a judgment of some \$28,000.00 in the Floyd Circuit Court against said defendant, and an execution may be expected to come into the hands of the sheriff of Delaware county whereby all the property of said defendant, not already covered by liens, will be taken, and other creditors will be deprived of any funds from which any parts of their debts can be collected.

"That plaintiff is informed that said defendant has other personal property than such as is included in said mortgage, which plaintiff could secure by the aid of the power of this court by the appointment of a receiver herein. The plaintiff is informed that a receiver either has been or will be appointed in the State of Ohio in suits pending against said defendant, to take possession of such property of defendant as may be found in said State. And the plaintiff avers that if the property covered by said mortgage should be taken by said execution from the said Floyd Circuit Court, it will result in great damage and detriment to the security of plaintiff's claim, and is in danger of being removed and materially injured.

"Wherefore plaintiff prays the court for the appointment of a receiver or receivers to take charge of the property of defendant and of the property covered by and included in said mortgage, to hold and protect the said mortgaged property for plaintiff, and to

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sell and otherwise dispose of all the property of the defendant for the benefit of his, said defendant's, creditors and this plaintiff, and to do and perform all the duties incident to such receivership.

"RYAN & THOMPSON, Attorneys for Plaintiff."

"Wilden E. Joseph, being first duly sworn, upon his oath says that he makes this affidavit for and in behalf of the plaintiff, and upon his said oath he further says that the matters and things in the above and foregoing complaint are true and correct.

"WILDEN E. JOSEPH"

"Subscribed and sworn to before me this 18th day of May, 1896.

"JOHN E. REED, Clerk."

Ryan & Thompson prepared an answer to this complaint, which was signed by the said L. L. Rankin, and is as follows:

"STATE OF INDIANA, }
COUNTY OF DELAWARE. } ss.

"UNION NATIONAL BANK OF MUNCIE, IND. }
v. }
ALEXANDER G. PATTON. }

"Comes Alexander G. Patton, defendant in the above entitled cause, and admits and confesses that the facts set forth in the complaint in this cause are true, and further says not.

ALEXANDER G. PATTON,

By RANKIN & RECTOR, his attorneys."

Mr. Ryan, of the firm of Ryan & Thompson, filed this answer with the complaint in the Delaware Circuit Court; and thereupon, on said 18th day of May, 1896, the court "orders that a receiver be appointed as prayed for, and that John C. Johnson and Wilden E. Joseph be and they are hereby appointed as such receivers, to take charge and possession of all the

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books, papers, property, and assets of every kind and description owned and possessed by the defendant, and apply the same, under the order and direction of the court, to the payment and liquidation of the debts of the defendant.

"And it is further ordered that said receivers be authorized and directed to, in their own name as such receivers, sue for and recover any and all claims and demands in law or in equity due the defendant, and take into their possession such real estate and personal property of said defendant as shall be in the State of Indiana, and title and right of possession thereto is vested in such receivers hereby, and such receivers to bring and maintain all suits necessary in relation to said trust.

"It is further ordered that John C. Johnson and Wilden E. Joseph execute their undertakings to John E. Reed, the clerk of this court, for the faithful performance of their duties as such receivers, each in the sum of \$65,000, and now said John C. Johnson tenders his said undertaking to the clerk of this court, with Abbott L. Johnson as surety thereon, which is approved by the court and said undertaking accepted and approved in open court, and in these words (H. I.); and now comes Wilden E. Joseph and tenders his said undertaking to the clerk of this court, with Edward Alcott, the Union National Bank of Muncie, Edward Alcott, cashier, and William Abbott as sureties thereon, which is approved by the court, and said undertaking accepted and approved in open court, and in these words (H. I.); and now comes John C. Johnson and Wilden E. Joseph, and each file their oath of office herein, which is in these words (H. I.). And day is given."

It was afterwards conceded that Wilden E. Joseph was an interested person, and his appointment unau-

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thorized, by the provisions of section 1237, R. S. 1894 (section 1223, R. S. 1881), and he was accordingly removed; but the receivership itself, and John C. Johnson as receiver, were continued.

On May 23, 1896, the State of Indiana, having recovered the judgment referred to in the complaint for the receivership, appeared by the Attorney-General in the Delaware Circuit Court, and asked leave to be permitted to intervene and move to set aside the order to appoint a receiver, and to dismiss the proceedings; which leave was granted on proper showing made, and thereupon the State filed its intervening petition to set aside the order appointing the receiver, and to dismiss the proceedings.

On June 2, 1896, the evidence was heard, and the motion of the State was taken under advisement; and on June 8, 1896, the motion and petition to set aside the receivership, cancel the order of appointment, and dismiss the proceedings, was denied. A motion for a new trial was also filed and overruled.

It is provided in section 1245, R. S. 1894 (section 1231, R. S. 1881), that in all cases in which a receiver is appointed or refused, the party aggrieved may, within ten days thereafter, appeal from the decision of the court to the Supreme Court, without awaiting the final determination of the case. We think the appeal of the State was taken in substantial compliance with the provisions of this statute. On being permitted to intervene, the State first sought relief in the court below, by asking for the setting aside of the order of appointment; and then excepted to the adverse ruling of the court on its motion. This was the first legal opportunity the State had to object and except to the action of the court, and to deny the right to appeal from that ruling of the court would be, in effect, to deny any appeal. The appeal is, practically, from the

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action of the court in the appointment of a receiver. See *Wabash R. R. Co. v. Dykeman*, 133 Ind. 56, 63. See also *Voorhees v. Indianapolis Car, etc., Co.*, 140 Ind. 220.

The first objection made to the validity of the appointment of the receiver is that the court had no jurisdiction of the person of the defendant, Alexander G. Patton, for the reasons, (a) that no summons had been issued or publication made against said defendant; (b) that there was no appearance in person by him; and (c) that the attempted appearance for him by a non-resident attorney, not admitted to practice in the court below, could not constitute a legal appearance, so as to confer jurisdiction. Section 1244, R. S. 1894 (section 1230, R. S. 1881).

It is provided in section 976, R. S. 1894 (section 964, R. S. 1881), that "Any court may permit an attorney who is not a resident of this State to practice law therein, during any term of such court, upon his taking an oath for the faithful discharge of his duties."

It appears that at the time the answer was filed in the receivership case, Mr. L. L. Rankin, who signed to said answer the name of "Alexander G. Patton, by Rankin & Rector, his attorneys," had not been admitted to practice in the Delaware Circuit Court. We do not find it necessary, however, to consider the question so raised; for a more serious objection is, that, whether Mr. Rankin had or had not a right to appear for Mr. Patton, it is not shown that he did in fact appear for him. The evidence, without objection or exception, discloses that while Mr. Rankin signed the name of the defendant to the answer, yet that the answer was written by Mr. Ryan, one of the attorneys for the plaintiff, and further, that the answer was filed in court by Mr. Ryan.

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In *Pressley v. Harrison*, 102 Ind. 14, which was a case in which Alfred Harrison brought suit against his partner, John C. S. Harrison, it appeared, as in this case, that no process was issued upon the complaint, and that the defendant did not appear, either in person, or by attorney, but that Alfred Harrison filed with his complaint a paper purporting to have been signed by John C. S. Harrison and to be an answer to the complaint. This court held that no appearance by the defendant was thus shown. "It is impossible," said Judge Mitchell, speaking for the court in that case, "to hold that signing and delivering to the plaintiff in the case the several papers above set out, and the presentation of them by him to the judge, constituted an appearance by the defendant, either to the action or to the proceedings before the judge. * * * One party to an adversary proceeding cannot do anything, nor can he be authorized to do anything by the other, which can give the court or judge jurisdiction over him except as the statute has enacted. As the statute does not authorize, and public policy forbids, one party to appear for the other, it must be held that where it appears, as here, that the only jurisdiction which the court or judge had over the defendant was such as was acquired through the agency of the plaintiff in appearing for him, its proceeding was without jurisdiction and void."

The case at bar is much weaker than the case of *Pressley v. Harrison*, *supra*. Here the paper purporting to be an answer was not signed by the defendant himself, but by a stranger to the court, who professed to be an attorney of the defendant, and resident in the state of Ohio. And not only was there no appearance in court by the defendant in person, but even the individual who assumed to act for him did not appear.

In the former case, the only appearance for the de-

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fendant was by the plaintiff; in this case the only appearance for the defendant was by the attorney for the plaintiff.

In *Pressley v. Lamb*, 105 Ind. 171, it was held that an appearance by defendant in person and the signing and filing of an answer by him, would be such an appearance as would give the court or judge jurisdiction for the appointment of a receiver. In the case before us, it is not claimed that there was any personal appearance by the defendant; neither was there such appearance by anyone for him, other than the plaintiff's attorney.

It is also contended that the court had no jurisdiction of the subject-matter of the receivership, for the reason that there was no cause pending between the parties, and the complaint was for the appointment of a receiver for the property of an individual and not of a corporation.

It was said in *Bufkin v. Boyce*, 104 Ind. 53: "Whether a complaint may in any case be maintained when no other facts are stated upon which relief is asked, we need not decide in this case. Without doubt, the appointment of a receiver may be part of the relief asked in a complaint, in actions of the class in which receivers may be appointed. *Newell v. Schnull*, 73 Ind. 241. It may, however, admit of much question whether this can be the sole purpose of an action. In the case of *Hottenstein v. Conrad*, 9 Kan. 435, it was said: 'The appointment of a receiver is a provisional remedy. It is an auxiliary proceeding. It is not the ultimate end or object of a suit.' In *Chicago, etc., Co. v. U. S. Petroleum Co.*, 57 Pa. St. 83, Agnew, J., said: 'The appointment of a receiver is the exercise of a power in aid of a proceeding in equity, and is the subject of a sound discretion.' *Pressley v. Harrison*, *supra*; High Receivers, section 6."

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In Beach Receivers, section 51, it is said: "That courts have no inherent power to appoint receivers except as an incident to a pending action, save in cases of idiots, lunatics and infants."

So, also, in High Receivers, section 17: "Ordinarily, unless perhaps in the case of infants or lunatics, a suit must be actually pending to justify a court of equity in appointing a receiver."

And in section 83, of the work last cited, it is said: "The usual practice, both in England and America, is to appoint receivers only upon bills filed for that purpose, and as a general rule the courts will not grant the relief merely upon petition, when no cause is actually pending and no bill filed to give the court jurisdiction, unless in very special cases of emergency." See also 20 Am. and Eng. Ency. of Law, 17, 24, 30, 87.

In the case before us, there was no action pending between the parties. The debt of the defendant to the plaintiff was not yet due; and no proceeding whatever had been instituted for its collection. Unless, therefore, our statute gives some authority specially applicable to this case, the court could have no jurisdiction to appoint a receiver for the defendant's property.

Receivers are appointed under provisions of section 1236, R. S. 1894 (section 1222, R. S. 1881), in certain cases therein named. In all the cases named, except, perhaps, the fifth and seventh, it is plainly provided that there shall already be an action pending between the parties, in which action the receiver may be appointed as auxiliary to or in aid of the principal action. In the fifth case named it would appear that a receiver may be appointed to take charge of the property of an insolvent or otherwise disabled corporation. And it was under this fifth clause that the two cases upon which appellee chiefly relies were

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brought, namely: *The First Nat. Bank of Mauch Chunk v. The U. S. Encaustic Tile Co.*, 105 Ind. 227, and *The Supreme Sitting, etc., v. Baker*, 134 Ind. 293 (20 L. R. A. 210).

But even in the two cases cited, it is doubtful whether the appointment of a receiver was not merely in aid of the main object of the suits, namely an accounting by the officers and the proper application of the funds of the corporation. In the later case it is said, by Olds, J.: "As a rule, if not universally, the appointment of a receiver is ancillary to the main cause pending, as in case of the foreclosure of a mortgage, an action by a creditor against an insolvent corporation in which he asks judgment for his claim, the dissolution of a partnership or of a corporation, and many like cases." And it was further said in that case, referring to the case of *First Nat. Bank, etc., v. U. S. Encaustic Tile Co.*, *supra*: "We do not find it necessary to give the statute so broad a construction as given in this case, that a receiver may be appointed under the statute when the sole object sought is to take the property from the hands of the officers. In the case at bar, the object of the proceedings, as we hold, is to secure the accounting of the officers, the application of the funds to the proper objects of the corporation, and the office of a receiver is the means or force sought to aid in accomplishing this object."

But, even granting that, under our statute, where a case is not pending, a receiver may yet be appointed when a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights; still, that forms no justification for the appointment of a receiver for the property of an individual, as in the case before us. A corporation is a mere creature of the law, looking to its

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franchise for the terms of its existence and of its conduct; and if this franchise be forfeited or in danger of forfeiture there is good reason why the law should at once take possession of the property of its failing creature and administer such property for the benefit of those entitled to it. But in the case of a natural person there remains an owner capable of keeping and using his property; and this property should not be taken from him, except by an action duly brought for that purpose. Before judgment is obtained it may be necessary, in certain cases, by notice of *lis pendens*, by attachment, by restraining order, or otherwise, to prevent the debtor from disposing of his property before the termination of the suit; but the property should not be taken from him until a lien has first been acquired by judgment or otherwise; or at least until an action has been brought for the purpose of securing such lien. Unless, possibly, in cases provided for by the statute, the appointment of a receiver can only be made in aid of the main action; although such appointment may be a part of the relief sought by the complaint. Here it was the sole relief sought, no action being pending between the parties.

Finally, even if, in any case, it could be lawful to appoint a receiver to take possession of the defendant's property, such appointment could only be for the property covered by the lien of plaintiff's mortgage. In this case, the court attempted to put the receiver in possession of all of the property of the defendant, wherever found in the State, whether the plaintiff had any lien upon or title to it or not.

As said in *Steele v. Aspy, Admr.*, 128 Ind. 367, "To authorize the interposition of the court by the appointment of a receiver, it was essential that the appellee should show either a clear legal right in himself to the property in controversy, or that he had some lien upon,

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or property-right in it, or that it constituted a special fund out of which he was entitled to satisfaction of his demand. It was essential, to authorize the exercise of such jurisdiction, for the appellee to show that he had a present, existing interest in the property. High Receivers, sections 11 and 12; Beach Receivers, section 5; *Smith v. Wells*, 20 How. Prac. Rep. 158." See further, High Receivers, sections 406, 407, 755; *State v. Ross*, 122 Mo. 435 (23 L. R. A. 534); *Whitney v. Bank*, 71 Miss. 1009 (23 L. R. A. 531).

In the case before us, the plaintiff had no judgment or other general lien against the defendant's property. His only lien was that of his chattel mortgage; and without a suit to foreclose that mortgage he had no right to a receiver even for the property covered by that mortgage. Still less was there a right to a receiver for property not covered by plaintiff's chattel mortgage. The rights of judgment creditors could not thus be cut out by one who had no judgment or other lien upon the defendant's property.

From any point of view, therefore, it must be apparent that the court had no jurisdiction to appoint a receiver in this case.

The judgment is reversed, with instructions to sustain the motion of the appellant to set aside the order appointing receivers, and to discharge the receivership and dismiss the action.

THE PENNSYLVANIA CO. v. FINNEY, ADMINISTRATOR.

[No. 16,361. Filed Jan. 29, 1896. Rehearing denied June 17, 1896.]

MASTER AND SERVANT.—Contributory Negligence.—A railroad brakeman is guilty of contributory negligence in descending a ladder at the side of a car, for his own purposes, with his face toward the car, without looking for a water plug or crane standing so near the car

145	551
146	463
147	507

145	551
152	598

145	551
170	35

145	551
171	314

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as to be dangerous; which was open and obvious to all, and which he had passed almost daily for six months preceding the accident.

SAME.—*Contributory Negligence.*—*Burden of Proof.*—Plaintiff, in an action for the death of an employe, must affirmatively show by the evidence, not only negligence on the part of the master, but freedom therefrom on the part of the servant; and when the evidence in the record fails to prove this fact the judgment upon appeal to this court must be reversed.

From the Allen Superior Court. *Reversed.*

Allen Zollars, for appellant.

L. M. and H. W. Ninde, for appellee.

JORDAN, J.—The appellee, as the administrator of Patrick J. Finney, sued to recover damages growing out of the death of his decedent, through the alleged negligence of the appellant. The complaint, among other things, avers that the appellant is a corporation and operates a railroad running from Pittsburgh to Chicago through Columbia City and Fort Wayne, Indiana; “that on the 5th day of April, 1890, at and near the defendant’s station at Columbia City, the defendant carelessly and negligently maintained a water plug so near its track that a brakeman, standing upon, and climbing up, on the side of cars, would come in contact with said water plug and strike against the same; that the defendant, knowing said water plug to be dangerous to its servants in working upon and climbing over its cars in passing said water plug, unlawfully and negligently, on said day, carelessly maintained said water plug in said dangerous position, and ordered and directed said Patrick J. Finney to go upon its freight train on said day, and work upon and brake upon the same, and did negligently direct the said Patrick J. Finney, who was then and there in the employ of the defendant as its brakeman on said train, to climb up and over and go upon the said train while passing by said water plug; that,

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in the careful, skillful discharge of his said duties as such employe, and to carefully and skillfully do his work and discharge his duties as such brakeman, he did, on said day, carefully, faithfully, and skillfully, and in obedience to defendant's orders, go upon said train and climb up and upon the side of said train in the faithful discharge of his duties as brakeman on said train, as the same passed said water plug, and, without any fault or negligence whatever on his part, his head, body, legs, and arms came in contact with and struck against said water plug, and the pipe, braces, and supports thereto attached, which then and there, crushed and mangled his arms, legs, body, and head and stunned and disabled him so that by reason thereof he was thrown to the ground upon the track of said railroad and between the cars in said train, and was run over by said train, and soon thereafter died from said injuries."

It is also alleged that the deceased, "did not know, nor remember, nor had he any reasonable opportunity of knowing or remembering, that said water plug and its pipes, braces, and supports thereto attached, were so near to the tracks of said railroad as to strike him while he was discharging his duty on said train, and because his mind was so absorbed in the discharge of his duties he did not, nor could not, know, or remember, that he was passing said plug, or that the same would strike him before he could climb up to and get upon the top of the train."

To this complaint the appellant filed an answer in denial, and a trial resulted, in the jury returning a general verdict for \$5,000.00, with answers to interrogatories. Over appellant's motion for a new trial, which assigned, among other reasons, that the verdict was not supported by sufficient evidence, and that the

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same was contrary to law, judgment was rendered upon the verdict.

It is strenuously insisted by appellant's learned counsel, that the verdict of the jury is not supported by the evidence, and that the appellee has wholly failed thereunder to sustain his alleged cause of action.

The material facts in the case, established by the evidence, as favorably to the appellee as he can insist, and in part found by the jury in answers to interrogatories, may be summarized as follows: Appellee's decedent was employed and entered the services of appellant in September, 1889, as brakeman on its freight trains running over its road. At the time of his employment he was twenty-two years of age, and continued in the service of appellant until April 5, 1890, the date of his death. The railroad company, at and before the time of the employment of the deceased, maintained water plugs, or water cranes, on its line of railway for the purpose of supplying its trains with water, one of which was erected and maintained by it at Columbia City, Indiana, which is a station on its line of railway. This latter crane was about seventeen or eighteen feet high, and was obvious to persons and was in plain view for a distance of one-half mile, to all persons operating the train upon which the decedent was braking at the time of the accident. Said plug stood about four feet and three and a half inches from the railroad track, the upper part leaning about eight inches towards the track, or, in other words, deviating about that much from the plumb line. The deceased had passed this plug and had an opportunity of seeing the same almost daily in daylight each month for a period of five or six months immediately prior to his death. It was his duty as a brakeman, it appears, when his train was passing a

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station, to go to the top of a car and there remain until the station was passed, when he was then privileged, if he so desired, to descend and go into the caboose attached to the train. On the forenoon of April 5, 1890, about 11 o'clock, the deceased was on top of the train, on which he was braking, in the discharge of his duty; as it was passing the station of Columbia City, said train at the time running at the rate of about fifteen miles an hour, and when it was passing the yards of the appellant at this station, he, having discharged his duty, and being at liberty to descend and go into the caboose, and desiring so to do, when the train was about two hundred feet west of the water crane, walked over the train to the rear end of the car with his back to the plug, and proceeded to climb down the car ladder, and while thus descending he came in collision with some part of the crane in question, and was thereby knocked off and thrown under the cars and killed. In going to the ladder to climb down, he had his back to the crane, but had he been facing the same, he would have seen it. He did not look for it at the time of the accident, or make use of any effort to ascertain its presence. By looking, he could have seen the water plug with which he collided, and in climbing down from the car at the time, he did so at his volition and not by or in pursuance of any direction or order of appellant.

Considered in the light of the law, which must control the case at bar, we are of the opinion, under the facts, that the jury was not authorized in finding a verdict in favor of the appellee. Assuming, without deciding, that the appellant was chargeable with actionable negligence in maintaining the water crane in the manner and in the condition shown, still, there is an absence of evidence showing freedom from contributory negligence upon the part of the deceased in

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the matter of which appellee complains. The rule is settled that the plaintiff in such a case as this, must affirmatively show by the evidence, not only negligence upon the part of the master, but freedom therefrom upon the part of the servant. The freedom from fault or negligence upon the part of the latter being, under the law, an essential element in the cause, which must be found to exist in order to warrant a recovery, a failure to establish the same, results in defeating the action, and when the evidence in the record fails to prove this material fact, the judgment upon appeal to this court must necessarily be reversed. *Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 449, and authorities there cited; *O'Neal v. Chicago, etc., R. W. Co.*, 132 Ind. 110; *City of Bedford v. Neal*, 143 Ind. 425; *Cincinnati, etc., R. W. Co. v. Duncan, Admr.*, 143 Ind. 524.

The deceased had been in the employ of the appellant for a period of six months, immediately preceding his death, during which time he had passed over the road, on his train, and passed the water plug in controversy, repeatedly, in daylight, each month. He thereby had the opportunity of seeing the crane and apprising himself of its close proximity to the track; and any danger that might result therefrom by reason of this fact, in descending by the car ladder from the train when it was passing the plug.

The latter was open and "obvious" to all, and from its height could be plainly seen for a distance of a half mile by all persons operating the train upon which the deceased was employed as brakeman on the day of the fatal occurrence. On that day, it appears that when approaching the station of Columbia City, he, in the discharge of his duty, went upon the top of the cars, and there remained until the train, which at the time was running at the rate of about fifteen miles per

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hour, had almost passed said station, and then, when his train was at a point about two hundred feet west of the water plug, he, desiring to descend from the car to the caboose, walked to the rear end of the car with his back towards the crane, almost in its actual presence, and, without direction or orders from appellant, started to descend the ladder on the side of the car, with his face towards the side of the latter, for the purpose of going to the caboose. By looking, he could have seen the crane, but this he neglected to do; nor did he make any effort to ascertain its presence. The decedent at the time was under no compulsion or requirement to make the descent from the car to the caboose. It is not shown that any duty called him to go to the latter, at the time he made the attempt so to do, and the presumption is, that his purpose to go to the caboose, at the time, was for his own comfort. Had he waited but a few moments, before making the effort to descend, the train would have passed the water plug, and all danger from it would have been avoided. It was his duty to observe his surroundings before attempting to go down the ladder, and had he exercised ordinary care and prudence in this respect, it is manifest, we think, from the facts, that the accident would not have occurred. This care, under the circumstances, he was required to exercise, and his failure to do so, under the law, defeats the action. In addition to the cases heretofore cited on this proposition, see *Oleson v. Lake Shore, etc., R. W. Co.*, 143 Ind. 405; 32 L. R. A. 149; *Wood Master and servant*, section 364.

Everything, as it appears, was open and visible to the decedent; he was a man of twenty-two years of age, and had he used his senses and faculties with which it is presumed nature had endowed him, we think, he would have escaped the danger to which, it

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is contended, appellant had exposed him. The means which a person has of knowing that under the circumstances he will expose himself to peril, are deemed, in law, to be evidence of knowledge of that fact. *Muldowney v. Illinois, etc., R. W. Co.*, 39 Ia. 615; *McKee, Admr., v. Chicago, etc., R. W. Co.* 83 Ia. 616, 13 L. R. A. 817.

In *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, this court said: "The law requires that men shall use the senses with which nature has endowed them, and when, without excuse, one fails to do so, and is injured in consequence, he alone must suffer the consequences." See *Salem, etc., Stone Co. v. O'Brien*, 12 Ind. App. 217.

In no case will the master be held liable to the servant where the latter brings injury upon himself which he might have avoided by the exercise of reasonable care and prudence. *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151.

In the case of *O'Neal v. Chicago, etc., R. W. Co.*, *supra*, the plaintiff, a servant of the company, claimed to have been injured by being thrown from the car by reason of a defective side track. In considering the question this court said: "It is firmly settled in this State that the plaintiff in such a case as this must affirmatively show that he was free from contributory negligence. We can find no direct facts showing that the appellant exercised ordinary care. He was bound to exercise care proportionate to the danger of his service. *He was bound to know what was open and obvious*, and, as it is expressly and directly stated as a fact that the condition of the side track was '*open and obvious*,' we must presume that he had notice. Having this notice, he was bound to exercise care to avoid being thrown from the car by the '*jerking and lurching motion*,' caused by the uneven and insecurely fastened track.

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We do not think that it can be inferred from the fact that he was standing on the top of the car near the brake trimming his lamp, that he was free from contributory negligence. We are, indeed, strongly inclined to think that the inference is that he did not exercise such care as the situation and surroundings required of him." (The italics are our own.)

In like manner and for the same reason, we may affirm that appellee's decedent did not, under the facts, observe his surroundings or exert the care required of him under the law; and hence, in the eye of the latter, he was chargeable with contributory negligence, and the allegations in the complaint, to this extent at least, are not sustained by the evidence.

It is also averred in the complaint that appellant ordered and directed Finney "to climb up and go upon the train when it was passing the water plug," and that in obedience to such orders he "did climb up and stood upon the side of said train in the faithful discharge of his duties as brakeman." The evidence fails to establish any such a state of facts as these. As we have heretofore stated, the accident occurred as the deceased was attempting to descend to the caboose, upon his own volition, and not under or by any direction of the appellant.

We are unable to discover, in this cause, any evidence in the record from which a reasonable inference can fairly arise, that appellee's decedent was in the exercise of due and ordinary care at the time of the fatal accident.

The jury was not authorized, arbitrarily, without evidence, to infer the absence of contributory negligence upon the part of the deceased servant.

The following additional cases are in line with the reasoning in the case at bar, and lend support to the conclusion reached. *Lovejoy v. Boston, etc., R. R. Co.*,

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125 Mass. 79; *Gibson v. Erie R. W. Co.*, 63 N. Y. 449; *Illick v. Flint, etc.*, R. R. Co., 67 Mich. 632; *Ryan v. Canada Southern R. R. Co.*, 26 Am. and Eng. R. R. Cases, 344; *Kelly v. Baltimore, etc.*, R. R. Co., 11 Atl. Rep. 659; *Sisco v. Lehigh, etc.*, R. W. Co., 145 N. Y. 296, 39 N. E. Rep. 958; *Perigo v. Chicago, etc.*, R. R. Co., 52 Ia. 276; *Davis v. Columbia, etc.*, R. R. Co., 28 Am. and Eng. R. R. Cases, 440; *Austin v. Boston, etc.*, R. R. Co., 164 Mass. 282, 41 N. E. Rep. 288; *Goldthwait v. Haverhill, etc.*, St. R. W. Co., 160 Mass. 554, 36 N. E. Rep. 486; *Gould, Admr., v. Chicago, etc.*, R. R. Co., 66 Rep. 486; *Gould, Admr., v. Chicago, etc.*, R. W. Co., 66 Ia. 590; *Atchinson, etc.*, R. R. Co. v. *Retford*, 18 Kan. 245; *Goodes v. Boston, etc.*, R. R. Co., 162 Mass. 287, 38 N. E. Rep. 500; *Platt v. Chicago, etc.*, R. W. Co., 84 Ia. 694; *Rains v. St. Louis, R. W. Co.*, 71 Mo. 164; *Missouri, etc.*, R. W. Co. v. *Somers*, 71 Tex. 700; *Tuttle v. Detroit, etc.*, R. W. Co., 122 U. S. 189; *Kehler v. Schwenk*, 144 Pa. St. 348, 27 Am. St. Rep. 633; *Coombs v. Fitchburg R. R. Co.*, 156 Mass. 200; 30 N. E. Rep. 1140; *Chicago, etc.*, R. R. Co. v. *Clark*, 15 Am. and Eng. R. R. Cases, 261.

The judgment is reversed, and the cause is remanded, with instructions to the lower court to sustain the motion for a new trial.

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[No. 17,785. Filed March 27, 1896. Rehearing denied July 17, 1896.]

MISCONDUCT OF COUNSEL.—*Statement to Jury.*—*When Not Reversible Error.*—A statement made by the assistant prosecuting attorney, on a trial for murder, in the opening statement to the jury, that the reason murders were so frequent in the county was because life was held so cheap, is not cause for reversal on appeal, where

145	500
154	366
156	249
158	250
145	500
161	295
145	500
165	185
145	500
171	452

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the jury was instructed not to consider the same and counsel was told not to go outside the record.

TRIAL.—Evidence.—Admission of Improper Evidence.—When Not Reversible Error.—Homicide.—The admission of incompetent evidence, on a trial for murder, tending to show premeditation and malice on the part of the defendant, is not prejudicial error where he is found guilty of manslaughter only, and there was competent evidence from which he might have been found guilty of the latter offense.

SAME.—Examination of Witness.—Whether a witness, who has already testified to a given fact, may be re-examined in regard thereto, is a question within the sound discretion of the trial court.

INSTRUCTION TO JURY.—When Not Prejudicial to Defendant.—An instruction to the jury in a trial for murder in the first degree that they might find the defendant guilty of either voluntary or involuntary manslaughter, although not recognized as distinct crimes by statute, was not prejudicial to defendant.

SAME.—When Erroneous Instruction Given is Not Reversible Error.—An erroneous instruction on the subject of murder is not prejudicial to defendant, where he is found guilty of manslaughter only.

From the Sullivan Circuit Court. *Affirmed.*

J. S. Bays, for appellant.

W. A. Ketcham, Attorney-General, *W. L. Slinkard*
and *F. E. Matson*, for State.

HOWARD, J.—The appellant was indicted for murder in the first degree, for the killing of Charles S. Lockard. By the verdict of the jury, he was found guilty of manslaughter, and his punishment assessed at imprisonment in the State's prison for twenty-one years.

It is contended that the court erred in overruling the motion for a new trial. The reasons for the motion call in question the correctness of the court's ruling; (1) in relation to the misconduct of counsel for the State; (2) in relation to the admission and exclusion of certain evidence; (3) in the giving of instructions to the jury; and (4) also, call in question the sufficiency of the evidence to support the verdict.

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. There is some conflict in the evidence; but that which sustains the verdict shows: That the appellant and the deceased were engaged together in keeping a saloon in a small town, named Lyonton, or Buel City, in Sullivan county; that the deceased lived in the country, about two miles from the saloon, and that the appellant was in charge of the saloon for the greater part of the time; that the homicide took place on a Sunday evening, a little after 8 o'clock; that late in the afternoon of that day the appellant was in the saloon and said to one of the patrons that he and the deceased were having trouble about the business; that he believed Lockard was swindling him, "trying to beat him, and he was going to have a settlement with him the next morning, and he said if he didn't settle with him square he'd kill him;" that at the time this conversation took place, the appellant had in his pocket a revolver which he had borrowed from his cousin, and with which he shot Lockard afterwards, that evening; that a little later in the day, being about 5 o'clock, Lockard, having come in from his farm, was in the saloon with appellant, and there was then some dispute between them, the result of which was that Lockard took the key from appellant and put him out of the saloon and locked the door, after which Lockard got into his buggy and returned home; that, later in the evening, about 8 o'clock, and just before the people came out from evening services in a neighboring church, the appellant and some frequenters of the saloon, were sitting on beer barrels in the rear of the saloon eating oysters, when a shot from a revolver was fired through a broken glass in the window, just over appellant's head; that immediately all the party ran away except appellant, who went around towards the front of the saloon; that a second shot was fired within the saloon, and near to or from the front of the

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building; that it was a clear moonlight evening; that appellant stood at the side of the building, his body concealed by the side wall, but his head extended out, watching the front door; that as soon as the door opened and the body of the man within appeared, appellant, from his place at the corner, fired upon him; that the man in the door, who proved to be Lockard, fell wounded upon the sidewalk; that he died from the wound on the Wednesday after; that appellant, after shooting Lockard, went home, and then went to the county seat, where he gave himself up to the sheriff, surrendering his revolver and saying that he had shot Lockard.

It was the theory of the State that Lockard was displeased with appellant for keeping the saloon open on Sunday, and that there were also business misunderstandings between them; that Lockard was determined to keep appellant out; that he came back to the saloon for the purpose of watching appellant, and, finding him and his companions in the rear of the saloon, fired his revolver to frighten them off; that appellant, knowing that Lockard alone had a key to the building, knew that it was he who had entered and had fired the shot to warn him and his companions away; and that, still angry from the afternoon quarrel, appellant went around to the front to wait for Lockard to come out and to shoot him when he opened the door.

It was the theory of the defense, on the other hand, that appellant, on hearing the shot out of the rear window, believed that a burglar was in the saloon, and went around to watch him come out of the front door; that he cried out, "there is a burglar in the house;" that appellant's cousin, who then came up, said, "look out, he will come out shooting;" that as Lockard come out the door appellant was about to

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say, "throw up your hands," when he saw the man in the door point his revolver at him, and then appellant fired; that until Lockard cried out, "I'm shot," appellant did not recognize it was his partner, but all the time believed it was a burglar.

While the jury did not find the appellant guilty of murder, as it would seem they might have done from the evidence of the State, it is yet clear that they adopted the State's theory, at the same time that they gave to the appellant the benefit of any doubt that might exist as to his knowledge that it was Lockard who was in the saloon. As there was competent evidence to sustain the conclusion reached by the jury, we cannot disturb the verdict on this ground.

The alleged misconduct of the assistant prosecuting attorney, of which complaint is made, occurred in his opening statement to the jury, in which he said: "The reason why murders are so frequent in Sullivan county is because life is held so cheap." The appellant objected to this language, and moved the court to set aside the submission of the cause and discharge the jury from its further consideration. The court sustained the objection to the remark, but overruled the motion to set aside the submission of the cause. The court also instructed the jury as to the objectionable language as follows: "Gentlemen of the jury, counsel have no right to refer to anything outside of this case, and you must not consider anything except such things as have reference to the case on trial, and counsel must not go outside the records in this case any more."

We do not believe the appellant was materially prejudiced by the alleged improper language, the objection to which was thus sustained, and which was condemned by the court in the instruction given to the jury. Nor do we think the impropriety of the lan-

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guage was so gross that its evil effects, if any, might not thus be corrected. See Gillett Crim. Law, 2d ed., sections 901, 904, and authorities there cited. See also *Livingston v. State*, 141 Ind. 131.

The evidence objected to was given by Mrs. Lockard, widow of the deceased. She was permitted to testify, over the objection of appellant, that when her husband was about to return to the saloon, on the evening of the homicide, he informed her "that the defendant, Mack Pigg, was at the saloon or about the saloon, and that he was threatening, or he expected him, to break in; and he went back for the purpose of seeing what he was doing or going to do, to protect his property."

The verdict of the jury, however, as we think, shows that the admission of this evidence was harmless, even if erroneous. The evidence could only be of effect to show that there was ill-feeling between the parties, which fact, however, was abundantly established by other evidence, including that of the appellant himself. The evidence of Mrs. Lockard, moreover, in conjunction with other and legitimate evidence in the case, was calculated only to show premeditation and malice on the part of appellant, and that he killed Lockard by design, knowing at the time who he was. But the jury, by finding the appellant guilty of manslaughter, instead of murder, showed that they were not influenced by the improper evidence complained of.

As there was legitimate evidence, apart from that objected to, upon which the jury might have found the appellant guilty of manslaughter, as they did, or even of a higher grade of crime, as we think they might have done, we think it cannot be said that any error prejudicial to the appellant is shown by the admission of that evidence. Section 1964, R. S. 1894 (sec-

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tion 1891, R. S. 1881); *Skaggs v. State*, 108 Ind. 53; *Binns v. State*, 66 Ind. 428; *Powers v. State*, 87 Ind. 144; *Epps v. State*, 102 Ind. 539; *Strong v. State*, 105 Ind. 1; *Galvin v. State*, 93 Ind. 550.

The witness, Lamon, at the request of appellant, was recalled for further cross-examination. The following question was objected to by the State, and the objection sustained: "State to the jury whether or not you saw the man that came out, saw his hand; and, if so, what did he have in his hand, as he was coming out of the door?" This witness, on his original examination, had said that he did not see the man in the saloon come out the door just before he was shot. The question, therefore, so far as it sought to ascertain whether the witness saw Lockard come out of the saloon, was but an effort to have evidence already given repeated. Whether such re-examination of a witness as to a matter already testified to by him shall be permitted, is a question within the sound discretion of the court. 3 Rice Ev. 335. And so far as the question sought to ascertain whether or not Lockard had anything in his hand, that was not cross-examination, but a part of appellant's original defense. He might, therefore, have called the witness for himself to prove such defense, if he desired. Whatever the object of the question, we do not think the appellant has any just cause to complain of the ruling of the court in excluding the answer. *Wood v. State*, 92 Ind. 269.

In the sixth instruction, the court charged the jury that under the indictment for murder in the first degree they might find the defendant guilty of either voluntary or involuntary manslaughter. It would have been better, perhaps, if the charge of the court had been that under the indictment for murder in the first degree the jury might find the defendant guilty of manslaughter, defining also the crime of man-

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slaughter. In strictness, it cannot be said that the statute recognizes voluntary and involuntary manslaughter as distinct crimes. The crime is simply manslaughter; and that is defined to be an unlawful killing, without malice. The killing may be voluntary, in a sudden heat; or it may be involuntary, in the commission of an unlawful act. In either case, however, it is an unlawful killing, without premeditation or malice. In either case, also, the punishment is the same, being imprisonment in the State's prison not more than twenty-one years, not less than two years.

In *State v. Lay*, 93 Ind. 341, the court had under consideration the form of an indictment for manslaughter; and we do not think there is anything there said which is inconsistent with the holding here made.

We cannot see, moreover, that the appellant was harmed by drawing the attention of the jury to the fact that his act might have been involuntary. That could only tend to a mitigation of the punishment fixed by the verdict. And if the court had simply charged, as would seem to have been better, that a verdict of manslaughter would be good under the indictment for murder in the first degree, and at the same time had defined the crime of manslaughter, the effect could not have been more favorable to appellant.

By section 1904, R. S. 1894 (section 1835, R. S. 1881), it is provided that "the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment or information."

Now, the commission of manslaughter, as defined in section 1981, R. S. 1894 (section 1908, R. S. 1881), is plainly included in that of murder in the first degree,

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as that crime is defined in section 1977, R. S. 1894 (section 1904, R. S. 1881). The essential element of manslaughter, as appears in the definition, is an unlawful killing. That element of the crime is certainly included in the charge of murder, in either degree. The unlawful killing may be either voluntary, upon a sudden heat, or it may be involuntary, and in the commission of some unlawful act. In either case, however, it is an unlawful killing; and the offense, as such, is included in the greater charge of murder.

That a verdict of manslaughter is good under an indictment for murder in the first degree, see further, *Moon v. State*, 3 Ind. 438; *Dukes v. State*, 11 Ind. 557; *Carrick v. State*, 18 Ind. 409; *Powers v. State*, *supra*; *State v. Fisher*, 103 Ind. 530.

It is contended that the twelfth instruction was erroneous for the reason that in it the court stated that the jury might find the defendant guilty of murder if they found that he killed the deceased purposely and maliciously. We do not think that the jury could be misled by this instruction, although the killing of the deceased "purposely and maliciously," but without premeditation, would be only murder in the second degree. Inasmuch, however, as the jury did not find the appellant guilty of murder in either degree, the instruction could not have been prejudicial to him.

We think that the able and zealous counsel for appellant mistakes the purpose of the fourteenth instruction, which was, as we think, simply to show the jury what circumstances would reduce the crime charged from murder to manslaughter. The instruction does not, when its particular purpose is considered, and, in connection with the other instructions given, undertake to set out the facts which would constitute the crime of manslaughter, but only what facts being found would reduce the crime from murder to

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manslaughter. In our view, the instruction was favorable to appellant. In effect, it said to the jury that if the appellant in good faith believed the man in the saloon to be a burglar, and not the deceased, he could not be convicted of murder.

The fifteenth instruction, of which complaint is also made, but tended to carry out the same purpose as the fourteenth instruction. We do not think that either instruction was prejudicial to the rights of the appellant. See *Colee v. State*, 75 Ind. 511; *McDermott v. State*, 89 Ind. 187; *Goodwin v. State*, 96 Ind. 550; *Boyle v. State*, 105 Ind. 469; *Davidson v. State*, 135 Ind. 254.

We find no error, for which the judgment ought to be reversed

Judgment affirmed.

SLACK ET AL. v. COLLINS ET AL.

[No. 17,555. Filed Jan. 29, 1896. Rehearing denied July 17, 1896.]

SALE.—Personal Property.—Lien.—Parol Agreement.—Statute of Frauds.—Where lumber is purchased and used in the improvement of real estate, upon a parol agreement that the vendor should have a lien on the real estate for the purchase-price of the lumber, such agreement is within the Statute of Frauds, and cannot be enforced.

SAME.—Personal Property.—Equitable Lien.—An equitable lien upon real estate, does not result from the sale of personal property, even though such personal property was furnished for, and used in the erection of buildings upon such real estate.

VENDOR AND PURCHASER.—Personal Property.—Lien.—A vendor of personal property has no lien for the unpaid purchase-money, after parting with the possession, but must look alone to the personal responsibility of the vendee.

From the Wabash Circuit Court. *Affirmed.*

T. G. Smith, for appellants.

Kenner & Lesh, for appellees.

MONKS, J.—This action was brought, by appellants against appellees, upon a promissory note, executed

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by Jesse D. Collins, one of the appellees, and to enforce an alleged lien against real estate conveyed by said Jesse D. Collins to his co-appellee, Eli A. Collins. Eli A. Collins filed a demurrer to the complaint for want of facts, which was sustained, and appellants refusing to amend the complaint, judgment was rendered in his favor. Judgment was afterward rendered in favor of appellants for the amount due on the note against Jesse D. Collins.

The only error assigned calls in question the action of the court in sustaining the demurrer of Eli A. Collins to the amended complaint. It is alleged, in the amended complaint, "that appellee, Jesse D. Collins, became indebted to appellants for lumber, and gave his note therefor, which is due and unpaid (a copy of which is set forth in the complaint); that said lumber was sold by appellants to said Jesse D. Collins, to be used in the construction of buildings and improvements on certain real estate in Huntington (describing it), then owned by said appellee, and that said lumber was so used in the construction of said buildings, which became and were real estate; that said lumber was sold and the credit given by appellants to said appellee upon the express agreement that the real estate and buildings described should be considered and held as a security for said indebtedness, and the same should be a lien thereon to secure the payment of said indebtedness; that said appellant soon thereafter become insolvent, and that while insolvent he sold and conveyed said real estate to his co-appellee, Eli A. Collins, who took the same with the full knowledge of the foregoing facts, and that said note is due and unpaid, etc. Demand for judgment on the note, and that the same be declared a lien on said real estate, and that the same be sold," etc.

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We think the court did not err in sustaining the demurrer of Eli A. Collins, the subsequent purchaser, to the amended complaint. So far as the alleged lien rests upon the oral agreement set forth, it is in violation of the Statute of Frauds. *Richter v. Irwin*, 28 Ind. 26; *Irwin, Admr., v. Hubbard*, 49 Ind. 350, 19 Am. Rep. 679; *Brumfield v. Carson*, 33 Ind. 94. And it is well settled that the vendor of personal property has no lien for the unpaid purchase-money after parting with the possession, but must look alone to the personal responsibility of the vendee. *Cade v. Brownlee*, 15 Ind. 369; *James v. Bird*, 8 Leigh (Va.) 510. 31 Am. Dec. 668, and note 670; *Lupin v. Marie*, 6 Wed. 77; *Johnson v. Farnum*, 56 Ga. 144; *Jenkins v. Eichelberger*, 4 Watts. 121, 28 Am. Dec. 691, and note 694; *Parks v. Hall*, 2 Pick. 206; *Fitzgerald v. Elliott*, 162 Pa. St. 118, 42 Am. St. Rep. 812, and note 814; *Lewis v. Steiner*, 84 Tex. 364; 4 Waits Actions and Def. 324; 21 Am. and Eng. Ency. of Law, 603, note 2, 608, and note 1.

If appellants had taken from the purchaser a chattel mortgage on the lumber at the time of the sale thereof, and not recorded the same within ten days, it could not have been enforced against a subsequent purchaser of the lumber, or of the real estate on which the same was used, with notice of such mortgage. *Ross v. Menefee*, 125 Ind. 432, and cases cited on p. 439.

It is clear that the building and improvements in which said lumber was used were real estate, and not personal property. *Seymour v. Watson*, 5 Blackf. 555; *Ricketts v. Dorrel*, 55 Ind. 470; *The Bass Foundry, v. Gallentine et al.*, 99 Ind. 525.

It is claimed, however, by appellant that the indebtedness mentioned in the amended complaint was a lien on the real estate upon which the lumber was

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used, irrespective of the agreement for a lien, the same as in the case of purchase-money for real estate.

This was not a sale of real estate, but a sale of personal property. An equitable lien upon real estate does not result from the sale of personal property, even though such personal property was furnished for and used in the erection of buildings upon such real estate.

To obtain a lien in such cases proper steps must be taken under the statute concerning liens. Sections 7255-7267, R. S. 1894

There is no error in the record.

Judgment affirmed.

145 572
154 620

GIFFORD DRAINAGE DISTRICT ET AL. v. SHROER ET AL.

[No. 17,285. Filed September 22, 1896.]

DRAINAGE.—Public Utility.—Police Power.—The reclamation of wet lands, and the drainage of ponds and marshes is of public utility, and is for the benefit of the public health and welfare; and it is by virtue of the police power that the authority of the State is exercised to enact drainage laws.

SAME.—Public Utility.—The legislature has no power to enact a law authorizing one person to improve his own, or the lands of another, by drainage or otherwise, and compel the other persons benefited to pay therefor, unless the public is also benefited.

SAME.—District Drainage Act.—Constitutional Law.—Section 22, of the District Drainage Act of 1893, section 5739, Burns' R. S. 1894, which authorizes the formation of a drainage district, upon the signing of an agreement by two-thirds or more in number of the owners of land, owning in acreage two-thirds or more of the land in the proposed district, but which does not require that the proposed drainage shall benefit the public health, or otherwise be of public utility, and does not even require that the lands within the proposed district shall be swamp or wet lands, is unconstitutional and void.

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From the Jasper Circuit Court. *Affirmed.*

S. P. Thompson, and *Elliott & Elliott*, for appellants.

M. F. Chilcobe, *Stuart Bros. & Hammond*, and *J. H. Douthitt*, for appellees.

MONKS, C. J.—Appellants, other than the Gifford Drainage District, commenced this proceeding under section twenty-two of the district drainage act of 1893. Acts of 1893, pp. 316-328, (R. S. 1894, sections 5718-5742).

Appellees were the owners of lands in the proposed district who had not signed the agreement provided for in said section. After the classification roll had been confirmed by the board of commissioners, as required by said section, appellees appealed to the court below, where, on their motion, the proceeding was dismissed upon the ground that said act was unconstitutional. The question of the constitutionality of said act is presented by the assignment of errors.

It has been uniformly held by this court that the reclamation of wet land and the drainage of ponds and marshes is of public utility, and is for the benefit of the public health and welfare. *Zigler v. Menges*, 121 Ind. 99, and cases cited on p. 102, 16 Am. St. Rep. 357.

So far as the drainage of wet lands will promote the health of the public, it is by virtue of the police power of the State that the authority is exercised to enact such laws. *Zigler v. Menges*, *supra*.

It is settled law in this State that the legislature has no power under the constitution to enact a law authorizing one person to improve his own, or the lands of another, by draining or otherwise, and compel the persons benefited to pay therefor, unless the public is also benefited thereby. *Deisner v. Simpson*, 72 Ind. 435, 441, 442; *Anderson v. The Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *Tillman v. Kircher*, 64 Ind. 104; *Chambers v. Kyle*, 67 Ind. 206, 210;

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McKinsey v. Bowman, 58 Ind. 88; *Anderson v. Baker*, 98 Ind. 587, and cases cited on p. 589; *Neff v. Reed*, 98 Ind. 341, 344; *Wishmier v. State*, 97 Ind. 160, 162; *Ross v. Davis*, 97 Ind. 79, 83, 85; *Zigler v. Menges*, 121 Ind. 99, 102, 106, 16 Am. St. 357, and note on p. 365; *Logan v. Stogsdale*, 123 Ind. 372, and cases cited on pp. 375, 376, 8 L. R. A. 58. See also *Cooley's Const. Lim.*, 530-532; *Fleming v. Hall*, 73 Ia. 598; *Jenal v. Green Island Nav. Co.*, 12 Neb. 163.

In *Anderson v. The Kerns Drainage Co.*, *supra*, this court, in speaking of what is to be regarded as a public object in taking private property, said: "The construction of canals and railroads and public highways, has been held such. *Dronberger v. Reed*, 11 Ind. 420. So has the improvement of streets in a city, for they are public highways. *Snyder v. Town of Rockport*, 6 Ind. 237. So has the drainage of marshes and ponds for the promotion of the public health. But the drainage of a man's farm simply to render it more valuable to the owner, would not be a work of public utility in the constitutional sense of the term; and a corporation organized and acting for such a purpose, would no more be acting in a public undertaking than would a company organized and acting for the cleaning up of men's farms and putting them in a better state of cultivation, than the proprietors were willing to do, though the public and the adjoining proprietors might be in a substantial degree benefited by the operation. And forcible taxation to pay for the same would hardly be tolerated."

In *Zigler v. Menges*, *supra*, this court said: "Whenever the reclamation or drainage of wet lands will promote the health there is a constitutional warrant for levying assessments to pay the expense of the drainage of such lands. * * * We neither hold nor mean to hold that benefit to the property of an individ-

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ual will warrant an assessment, for if the benefit is solely to private property irrespective of general or public considerations, no compulsory assessment would be valid, since one citizen cannot be compelled to contribute to the improvement of another's property."

In *Logan v. Stogsdale*, *supra*, it was said by this court: "It is true that in the preamble, and in some of the provisions in the body of the act, there is an indirect assertion that the use for which authority is conferred to seize private property is a public one, but such an assertion, even if made in the clearest terms, cannot rescue the act from condemnation, for it is not within the power of the Legislature to determine what is a public use within the meaning of the Constitution. Whether the use is a public one is a judicial question, and not a legislative one. * * A private use cannot be transformed into a public one by a mere legislative declaration."

It is not strictly correct, however, to say that in all cases where the taking of private property will benefit the public, or promote the public interest in any way, that the taking will be considered for the public use.

Judge Cooley in his work on Const. Lim., at p. 532, said concerning this question: "It is certain that there are very many cases in which the property of some individual owners would likely to be better employed or occupied to the advancement of the public interest in other hands than their owners, but it does not follow from this circumstance alone that they may rightfully be dispossessed. It may be for the public benefit that all the wild lands of the State be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things do give an aspect of beauty, thrift and comfort to the country

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and thereby to invite settlement, or increase the value of lands and gratify the public taste; but the common law has never sanctioned an appropriation of property based on these considerations alone, and some further element must therefore be involved before the appropriation can be regarded as sanctioned by our constitutions. The reason of the case and the settled practice of free governments must be our guides in determining what is and what is not to be regarded as a public use; and that only can be considered such where the government is supplying its own needs or furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare, which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful and needful for the government to provide.”

It follows that unless a general law in this State for the drainage of wet lands, makes proper provision for the determination in each proceeding of the question whether the particular ditch or system of drainage will be of public utility or promote the public health, welfare and convenience, it will be unconstitutional and void. Under any other rule the property of an individual could be assessed with benefits to construct a drain for the improvement of another's property, where there was no public benefit whatever.

The district drainage law of 1893, Act 1893, pp. 316-328 (R. S. 1894, sections 5718, 5742), provides two methods for forming districts; one by petition and one by agreement. Section one of the act (section 5718, R. S. 1894), requires that the petition must be signed by a majority of the adult owners of land, owning in the aggregate one-third of the area of the lands in the proposed district, and allege that said ditch or ditches,

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when established, will improve the public health, or be otherwise of public utility.

Section twenty-two (section 5739, R. S. 1894), requires that the agreement shall be signed by two-thirds or more in number of the owners of land, owning in acreage two-thirds or more of the land in the proposed district. But there is no provision in said act that in any proceeding commenced by agreement, under section twenty-two, that the same shall benefit the public health or be otherwise of public utility. Neither is there any provision in said act for the determination of said question at any time, where the proceeding is commenced under said section.

It is not even required that the lands within the proposed drainage district be swamp or wet lands. It is true the section provides, that the agreement shall be submitted to the county surveyor, who shall, "as soon thereafter as may be practicable, carefully consider all questions involved, by personal inspection of the land of said district or otherwise as he may see fit. And if said county surveyor shall become satisfied in his own mind that said lands require a combined system of drainage for agricultural purposes, * * * * then he shall endorse his approval upon said agreement and file the same with the accompanying plat in the county commissioners' court."

But this does not authorize the surveyor to determine whether the proposed system of drainage will be of public utility or promote the public health, or require that he decide these questions before he files the agreement. Whether the county surveyor could be empowered to determine such questions, we need not and do not decide. Lands might require a combined system of drainage for agricultural purposes, and at the same time such system of drainage not benefit the public

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health or be of public utility. Drainage to benefit the lands for agricultural purposes alone would be for the purpose of private gain or advantage, and would merely subserve private interests without reference to those of the public. *In re Theresa Drainage Dist.*, 90 Wis. 301.

In re Theresa Drainage Dist., *supra*, the provision of the statute was: "If it shall appear that the proposed drain or drains, ditch or ditches * * * is or are necessary or will be useful for the drainage of the lands proposed to be drained thereby, *for agricultural, sanitary or mining purposes*," the court, in that case, said, "there is in the entire statute no expression or intimation that it was any part of the consideration upon which the improvement should be authorized that it should either be necessary or desirable to promote any public interest, convenience, or welfare. No doubt, such an improvement would be useful to some, or perhaps many, private owners of land by way of increasing the usefulness and value of their lands. But that is merely a private advantage. It interests the public indirectly and remotely, in the same way and sense in which public interest is advanced by the thrift and prosperity of individual citizens. *Donnelly v. Decker*, 58 Wis. 461. * * But it is urged that the term 'sanitary purposes' comprehends and imports the idea of the public health. If so, it might save this statute. * * It will be seen that the word (sanitary) is purely of abstract meaning. It is utterly devoid of any suggestion of numbers or of public or private relation. It imports neither. * * * Without some qualifying word it is inoperative to designate the purpose as a public one or as in the interest of public health. * * It must be held that it does not provide for a taking for public use. It could not lawfully provide for a taking

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for any other than a public use. It is entirely invalid."

The mere fact that a system of drainage would render lands tillable, more productive, or increase their value, does not authorize the exercise of either the police power or the power of eminent domain. *Anderson v. Kerns Drainage Co.*, *Kinnie supra*; v. *Bare*, 68 Mich. 625; Cooley's Const. Lim., section 532.

In proceedings commenced under section twenty-two, the statute attempts to confer the power to assess the property of those who have not signed the agreement or in any manner consented thereto, whether the same will benefit the public health or be of public utility or not. It assumes, therefore, to authorize the assessment of special benefits to one man's property for the benefit of another, even though the proposed drain will not be of public utility and will not promote the public health.

It is clear, for the reasons given, that said act, so far as it authorizes the construction of drains by proceedings instituted under the provisions of section twenty-two, is unconstitutional and void. If said section required all the landowners in the proposed drainage district to sign the agreement, it would probably not be invalid for the reason given, because the amount to be contributed by each landowner would be fixed by the agreement.

In proceedings by petition under section one of said act, provision is made for the determination of the question whether the proposed ditch or ditches would benefit the public health or be of public utility, and what we have said does not, therefore, apply to proceedings under that section.

Judgment affirmed.

Hussey v. Whiting.

HUSSEY v. WHITING.

[No. 17,899. Filed September 22, 1896.]

PARENT AND CHILD.—*Custody of Minor Child.—Welfare of Child.*—

Ordinarily the parent is entitled to the custody of his minor child; but where the welfare of the child is retarded by the custody of the parent, an exception to the ordinary rule exists.

SAME.—*Parent's Oral Agreement as to Custody of Child.*—An oral agreement, express or implied, made by a parent, that another should have the custody of his child during infancy, will not preclude the parent reclaiming such child.

HABEAS CORPUS.—*Parent and Child.—Custody of Child.*—At the death of a child's mother, and pursuant to a request of such mother prior to her death, a child six years of age was taken by its grandparent and boarded and cared for until the child was thirteen years of age; such grandparent having given the child every care and comfort necessary to its welfare and was willing and anxious to continue so to do. The father of the child, who remained a widower, had little property, and was a traveling man with an income of \$50.00 per month. The father took the child from its home with its grandparent and placed it with a relative who was kindly disposed to the child, but was not able financially to furnish the care and comforts provided by the grandparent; the child at the time being in delicate health. The grandparent instituted *habeas corpus* proceedings and was by the trial court awarded the child. *Held*, That the trial court had committed no error.

APPEAL AND ERROR.—*Assignment of Error.*—An assignment that the court erred in overruling appellant's motions to modify judgment, where there were numerous motions to modify the judgment, severally filed and severally overruled, does not present an available error.

From the Gibson Circuit Court. *Affirmed*.

Nebeker & Sims, for appellant.

A. H. Lindley, for appellee.

HACKNEY, J.—This was a proceeding by *habeas corpus* for the custody of Ray Hussey, a little girl thirteen years of age, and was instituted by the appel-

148	580
148	388
145	580
157	8
145	580
160	523

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lee, her maternal grandfather, against her father, the appellant. The decree of the lower court was in favor of the appellee, and the appellant submits the case to this court, by his appeal, upon the evidence.

It may be fairly said that, by a clear preponderance of the evidence either party entertains a deep affection for the child, and might reasonably be intrusted with her moral training. Since the death of her mother, some six years before the disagreement which resulted in this proceeding, she resided with her grandparents, who were possessed of a large, comfortable home, and lands of the value of \$20,000.00 or more, and were willing and prepared to render every care and comfort necessary to the welfare of the child. During the period mentioned the appellant continued, and still is, a widower, with little means above his indebtedness, but with an average income of \$50.00 per month from his business. Until he took the child from her grandparents he made his home with them, but his business, that of traveling salesman, required him to be absent from five to six days each week. He paid for his own boarding and supplied most of the material for clothing the child, but her boarding and care, and the making of her clothing were supplied by her grandparents. The appellant and the child took up their home with the appellee, pursuant to a request from Mrs. Hussey, while upon her deathbed, that they should have a home with, and that the child should be raised by the appellee and his wife. The parties differ as to the conversation at the time of this request, as to whether the appellant simply acquiesced in the request and the appellee's promise, or whether he declined to "give" the child to her grandparents. But there is no disagreement about the fact that the appellee and his wife cared for the child as a member of their family, and became greatly attached to her,

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and that the appellant took her from them, not by reason of any neglect or mistreatment of her, but because he and his mother-in-law, at times, disagreed and had bitter words as to his own relations to the household, and because he, without just cause, thought that the child was becoming estranged from him by the influence of her grandmother. When she was taken from the appellee's home she was taken to the home of the appellant's married sister, who lived in the town of Princeton, where the appellee lived also. The sister, Mrs. Eby, owned and lived in a house of four rooms; her husband labored at \$1.25 per day; there were four members of her family and a boarder five days in the week when the appellant and his daughter took up their new abode with her. Mrs. Eby was a kind-hearted woman, affectionate with children and favorably disposed towards the little girl; she performed all the duties of her household without a servant, and, while her circumstances were not the best, she was a fit woman to have the care and moral training of the child. Mrs. Hussey had died of consumption, and the child was delicate and evidently predisposed to that disease.

Ordinarily the father is entitled to the custody of his minor children. This was the rule of the common law, and is affirmed by statute in this State, but, where the welfare of the child is retarded by the custody of the father, an exception to the ordinary rule exists. The interests of society and the established policy of the law make the welfare of the child paramount to the claims of a parent. *Jones v. Darnall* 103 Ind. 569, 53 Am. Rep. 545; *Sheers v. Stein*, 5 L. R. A. 781, and note; *Joab v. Sheets*. 99 Ind. 328; Schouler Dom. Rel., section 248; *United States v. Green*, 3 Mason 482; *Bryan v. Lyon*, 104 Ind. 227, 54 Am. Rep. 309.

The oral agreement, express or implied, that the ap-

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pellee should have the custody of the child during her infancy would not preclude the appellant from reclaiming her custody. *Brooke v. Logan*, 112 Ind. 183; *Weir v. Marley*, 6 L. R. A. 672. The conclusion of the trial court, therefore, must have been reached upon the theory that the welfare of the child would be best promoted by remanding her to the custody of the appellee, and it remains for us to determine, upon the facts stated, whether that view of the case is supported.

Considering the delicacy of her health, the care and attention she requires on that account; the comforts of the spacious home of her grandparents; their relationship to, and affection for her; the understanding of her health, disposition and habits, acquired during the six years they have had the care of her, present a very strong claim in favor of their continued custody of her. The father's situation and business afford her no home with him, and, at best, from his standpoint, he can but supply her a home and its comforts by purchase, and with but little of his society. The home which he claims to be not less conducive to the welfare of the child than that from which he took her, is, no doubt, modest and reasonably comfortable under the circumstances, but certainly Mrs. Eby's obligations to her own immediate family, including her two children, would not afford her the time to bestow careful attention to the needs and wants of the child, and the crowded condition of her home of four rooms would certainly not be so conducive to the health of the child as that of her grandparents.

The conclusion of the trial court was not a mere discrimination between the luxuries of wealth on the one side and the modest comforts of an ordinary home on the other; nor was it a simple denial of the right of a father to have the care, custody, and training of

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his minor child. It was a recognition of the fact that a child requiring unusual care could probably not receive it and that her father sought to remove her, not to his own custody, but to that of another, whose situation in life was not so conducive to the health and general welfare of the child as with her grandparents.

The decree of the circuit court is criticised by counsel because of its having provided that the appellant should, "at proper times," be permitted to visit his child, without defining the phrase "proper times." The criticism, we presume, is made upon the assignment of error that "the court erred in overruling the appellant's motions to modify the judgment." There were numerous motions to modify the judgment, severally filed, and severally overruled, some of which were properly overruled, and it is not even claimed in argument that all were improperly overruled. There is, therefore, no available error.

The judgment is affirmed.

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[No. 17,988. Filed September 22, 1896.]

SERVICE BY PUBLICATION.—*Newspaper of General Circulation.*—*Statute Construed.*—A daily newspaper devoted to the general dissemination of legal news and containing other matter of general interest to the public, and having a large general circulation, is "a newspaper of general circulation," within the meaning of sections 330, 1299, Burns' R. S. 1894 (sections 316, 1279, R. S. 1881).

From the Marion Superior Court. *Affirmed.*

Pickens & Cox, for appellant.

H. Taylor, for appellees.

HOWARD, J.—This was an action in attachment,

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brought against the appellant by the appellee, Arthur W. Allen. The appellant, who is a non-resident, entered his special appearance in the cause, and filed a plea in abatement, averring that there had been no service of process upon him, "other than the pretended service of publication in a daily paper called 'The Daily Reporter,' printed and published in the city of Indianapolis, said county," and "that said pretended service by publication is invalid and of no effect for the reason the said 'The Daily Reporter' is not a newspaper of general circulation in said county."

Issue being joined on the plea in abatement, and the evidence being heard, the court found for the said appellee, and judgment was entered in his favor.

It is claimed that the publication of notice in The Daily Reporter was insufficient to give the court jurisdiction over the appellant, for the reason that the said Reporter is not a "newspaper of general circulation," as required by the statute. Sections 320, 1299, etc., Burns' R. S. 1894 (sections 318, 1279, R. S. 1881).

The evidence upon which the court found the publication sufficient under the statute, was, substantially: That The Daily Reporter is now, and was at the time of the publication of said notice, in general circulation throughout the city of Indianapolis, in Marion county, and State of Indiana, among judges, lawyers, bankers, collection and commercial agencies, real estate dealers, merchants, manufacturers, and other professional and business men; that it is also on sale at public news stands; that its circulation in the city of Indianapolis is about 550 copies, and outside said city throughout the State, about 2,500 copies daily; that its circulation is confined to no particular class or calling of the community, but is general among different classes; that it is published and circulated daily, except Sunday; that its columns are

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devoted primarily to the dissemination of legal matters, including proceedings of the Supreme and Appellate Courts of the State, and of the various Federal, State, county and city courts sitting at Indianapolis, giving a complete report, both of the pleadings filed in cases pending, and also of cases tried and the result of such trials, as well as publishing those upon the calendar for trial, and all new suits filed; that it also publishes the proceedings of the Board of Public Works of said city, giving said board's action in all matters relating to street and other improvements, and assessments against real estate on account thereof, and all matters of interest in relation to real estate generally; that it gives daily a complete record of the deeds filed in the recorder's office of said county, also of mortgages, mechanics' and other liens, assignments and sales of real estate by the sheriff under judicial process; that it also contains one or more columns devoted to the general news of the day of interest to general readers; also quotations of local securities of interest to newspaper readers generally; that it is the only newspaper published in said city containing a complete passenger time table of all railroads entering and leaving said city; that legal notices like the one in the case at bar have been made and published in said newspaper, as well as legal notices advertising sheriff's sales of real estate, and sales by executors or commissioners, and notice of appointments of administrators and executors; that it also contains varied advertising matter, confined to no one calling or trade, but such as is found in newspapers of general circulation; that there is also published in it news and information of a general character, such as is published in other newspapers of general circulation, and of interest to the general reader.

A copy of The Daily Reporter was also filed as an

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exhibit, and shows the general character of the paper to be such as is above set forth.

We think that the foregoing evidence shows, as the court found, that the publication in question is a "newspaper of general circulation," "printed in the English language and published in the county." Such notice would not, of course authorize a personal judgment in the main action against appellant, who is a non-resident, but only a judgment in attachment against his property, and also support the proceedings and judgment against the garnishee defendant. 22 Am. and Eng. Ency. of Law, 135.

By a "newspaper of general circulation," the legislature certainly did not intend a newspaper read by all the people of the county. As a matter of fact, every newspaper is, in greater or less degree, devoted to some special interest. No one, however, would claim that because a newspaper should, for example, be the organ of a certain political party, and especially devoted to the interests of such party, it would not therefore be a newspaper of general circulation. Yet such a newspaper is, to a large extent, read only by the members of the political party whose doctrines are advocated and expounded in its columns.

There is no doubt that where a publication is devoted purely to a special purpose it would be an unfit medium to reach the general public. A medical, literary, religious, scientific, or legal journal, is profess- edly but for one class, and that class but a compara- tively small part of the whole population; and it would be manifestly unjust, as well as against the let- ter and spirit of the statute, to use such a journal for the publication of a notice affecting the property or personal rights of citizens in general. The newspaper before us, however, is no such professional or class journal. While it is a law publication, in a certain

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sense, and of particular interest to the legal profession, yet its character, as shown by the evidence, makes it of general interest to the community at large, especially to that part of the community likely to be concerned with matters in courts and other public business. Indeed, it would seem that this newspaper is quite as likely as any party, or other paper of general circulation to reach the particular persons interested in the proceeding before the court; and, consequently, that the spirit of the statute is quite as well served as could be if the notice were published elsewhere. Its special purpose is to give the news of the courts, and to circulate this news generally amongst all those, who, whether of the legal profession or not, may be interested in such proceedings. We are, therefore, unable to see how the end proposed in the statute, namely, to reach by publication a party interested in a suit in court, could be better attained than by publication in this newspaper.

Wherever the question has been before the courts, the holding, so far as we have been able to learn, has been, that publications such as the periodical here under consideration, ephemeral in form, issued at short intervals, devoted to the general dissemination of legal news, and containing other matter of general interest to the public, are newspapers in the sense contemplated in statutes providing for the publication of legal notices to parties interested in proceedings before the courts. See *Kellogg v. Carrico*, 47 Mo. 157; *Benkendorf v. Vincenz*, 52 Mo. 441; *Kerr v. Hitt*, 75 Ill. 51; *Railton v. Lauder*, 126 Ill. 219; *Maass v. Hess*, 140 Ill. 576; *Lynch v. Durfee*, 101 Mich. 171.

The case of *Beecher v. Stephens*, 25 Minn. 146, even if not overruled by subsequent decisions, does not seem to be in conflict with the other cases cited. In that case the Northwestern Reporter, a periodical de-

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voted almost wholly to the publication of the general laws of the state and of the decisions of the courts of Minnesota and Wisconsin, was held not to be such a newspaper as provided for by the statute concerning publication of legal notices. We have already seen that a purely professional journal, whether legal, medical, religious or other like character, cannot be considered as a "newspaper of general circulation," so as to make it suitable for the publication of legal notices. Neither, of course, would a publication of a legal notice in a Sunday paper be sufficient, even though the paper were not a religious journal. *Shaw v. Williams*, 87 Ind. 158 (44Am. Rep. 756).

The purpose of the statute, namely, that notice may reach the party intended, should be kept in view. So it has been held that where the publication has been made by design in an obscure paper, with the obvious intent to avoid giving actual notice to the party in interest, the proceedings based upon such notice may be held voidable, even though the letter of the statute has been observed. *Webber v. Curtiss*, 104 Ill. 309; *Briggs v. Briggs*, 135 Mass. 306.

In the case before us, the newspaper circulates, to a great extent, among persons whose business it is to carefully watch the proceedings of the courts; and through such persons, if not directly, those interested are better enabled to receive knowledge of the matter before the court than if the notice were printed in a newspaper whose readers might not give so much attention to court proceedings.

We think the notice by publication in this case was good.

Judgment affirmed.

 Taggart, Auditor, *et al.* v. Claypool.

TAGGART, AUDITOR, ET AL. v. CLAYPOOL.

[No. 17,761. Filed May 26, 1896.]

STATUTORY CONSTRUCTION.—*A Statute May be Unconstitutional in Part, and Valid as to Residue.*—A statute may be unconstitutional in part and valid as to the residue, and if the unconstitutional portions can be stricken out, and still leave an operative statute, the unconstitutional portions must be regarded as eliminated and the remainder be enforced.

CITIES.—*Annexation of Territory.*—*Corporate Boundaries.*—*Statute Construed.*—*Indianapolis Charter.*—Sections 37 and 38, Act of 1891 (Acts of 1891, p. 137; sections 3808, 3809, Burns' R. S. 1894), providing for the annexation of territory by the common council, and granting the right of appeal to the resident freeholders only, is not a grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, do not equally belong to all citizens, and not in conflict with section 23, of article 1, of the State Constitution, nor with the clause in the fourteenth amendment to the Constitution of the United States, which provides, that: "nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

From the Marion Circuit Court. *Reversed.*

J. B. Curtis, for appellants.

A. J. Beveridge, for appellee.

MCCABE, J.—The appellee and another, whose death was suggested of record in the court below before judgment, sued the appellant, Taggart, as auditor, and the appellant, the city of Indianapolis, to enjoin each of them from extending certain described lands upon the tax duplicate of the county and city as city property.

It is shown that the threatened extension was about to be made by virtue of the annexation of certain contiguous territory to said city, which included

145	590
147	294
145	590
149	206
145	590
153	336
145	590
156	196
145	590
168	579

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seventy-five acres of unplatted farm land belonging to the plaintiffs. That such annexation was claimed by the defendants to have been effected by virtue of an ordinance adopted and passed by the common council of said city November 8, 1893, under and pursuant to the provisions of sections 37 and 38, of the charter of said city, approved March 6, 1891. Acts 1891, p. 137; R. S. 1894, sections 3808, 3809.

The circuit court overruled separate demurrers by each of the defendants to the complaint, assigning insufficiency of the facts stated therein to constitute a cause of action against each, and said defendants declining to plead over and standing on their demurrers, the court entered a decree, perpetually enjoining both defendants from entering said lands upon said duplicates for the purposes of city taxation, as prayed for in the complaint.

The right to tax the property for city purposes is not questioned on account of any formal or substantial defect in the ordinance of annexation, or for want of the observance of any legal requirements in the passage of the ordinance, either formal or substantial, but it is claimed that the defect is in the sections of the statute above referred to, constituting a part of the city charter.

The contention is that said sections are void because they violate the constitution of the State and the United States.

The first section above mentioned provides that "the common council shall have power, by ordinance, to declare and define the entire corporate boundaries of such city. * * * Such ordinance * * * may include contiguous territory, whether platted or not, not previously annexed. * * * Said common council may also, by separate ordinance, not purporting to define the entire boundaries of such city, annex con-

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tiguous territory, whether platted or not, to such city, and * * * shall be conclusive evidence * * * that the territory therein described was properly annexed and constitutes a part of such city, except as provided in the next section."

The next section provides, among other things, that "whenever such territory * * is unplatted ground, * * * an appeal may be taken from such annexation, by one or more resident freeholders, in the territory sought to be annexed, filing their remonstrance in writing against such annexation, together with a copy of such ordinance, in the circuit or superior courts of the county where such territory is situated; * * * such written remonstrance or complaint shall state the reason why such annexation ought not in justice to take place. * * * The court shall thereupon proceed to hear and determine such appeal without the intervention of a jury, and shall give judgment upon the question of such annexation according to the evidence which either party may introduce, relevant to the issue. If the court should be satisfied, upon the hearing that less than 75 per cent. of the resident freeholders of the territory sought to be annexed have remonstrated, and that the adding of such territory to the city will be for its interest and will cause no manifest injury to the persons owning real estate in the territory sought to be annexed, he shall so find, and said annexation shall take place. If the court shall be satisfied that 75 per cent. or more of the resident freeholders of the territory sought to be annexed have remonstrated, then such annexation shall not take place, unless the court shall find from the evidence that the prosperity of such city and territory will be materially retarded and the safety of the inhabitants and property thereof endangered without such annexation."

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The complaint alleges that the plaintiffs, though owners of the unplatted ground in question, included in the territory annexed, were, and are, not residents within said territory, but were, and are, residents within the city of Indianapolis. It is contended, therefore, that as the right of appeal is given only to resident freeholders in the territory sought to be annexed, and the same right impliedly denied to owners of land in the territory who do not reside therein, they are denied the equal protection of the law, their property taken without due process of law, and that privileges and immunities are granted to such resident owners which are denied to the plaintiffs on the same terms.

It is urged, at great length and with much ability, that the sections are void because they violate section 22 of Article 1, of the State constitution, which provides that: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

If we were to concede that the statute in question, giving the right of appeal to residents and in denying the same right to landowners not residing within the territory in question, is a violation of the constitutional provision quoted, it does not follow that the appellee's contention can be upheld that the whole of both sections of the act (the charter) are void. A statute may be unconstitutional in part and valid as to the residue. *Clark v. Ellis*, 2 Blackf. 8; *Madison, etc., R. R. Co. v. Whiteneck*, 8 Ind. 217; *State v. Newton*, 59 Ind. 173; *Wallace v. Board, etc.*, 37 Ind. 383; *Campbell v. Dwiggin, Treas.*, 83 Ind. 473; *Ingerman v. Noblesville Tp.*, 90 Ind. 393; *City of Indianapolis v. Bieler*, 138 Ind. 30.

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If the unconstitutional portions of a statute can be stricken out and still leave a complete statute, the unconstitutional portions must be regarded eliminated and the remainder of the statute must be enforced. *State, ex rel., v. Blend*, 121 Ind. 514; *State, ex rel., v. Gorby*, 122 Ind. 17.

The only part of the statute here in question, that can at all be regarded as in conflict with the constitutional provision quoted, is that part giving a right of appeal only to the resident freeholders. That part of the statute may be eliminated without in any way impairing the force of the provisions authorizing the common council to annex the territory. That part of the statute being eliminated, there is no discrimination between resident and non-resident owners of unplatted land within the territory to be annexed. They are all treated as the owners of platted ground within the territory to be annexed, namely, given no right of appeal whatever.

It is established law that territory may be annexed to a city, with or without the consent of the inhabitants of the territory affected. 15 Am. and Eng. Ency. of Law, 1007-1009, and authorities there cited; *Stilz et al. v. City of Indianapolis et al.*, 55 Ind. 515, and authorities there cited.

Appellee's learned counsel concedes this to be the law, but contends that the right of appeal being given to one class of owners, such right must be given to all, or the statute will be unconstitutional and void.

But we are of opinion that the provision as to appeal is not in conflict with the section of the bill of rights quoted above.

The ultimate right of annexation is made to depend practically upon the voice of 75 per cent. of the resident freeholders in the territory to be affected. It is the convenience, safety, and well-being of the inhab-

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itants of the territory to be affected on the one hand, and that of the city on the other, that the statute makes the criterion for determining the question of annexation. And in order to insure permanency of interest in the inhabitants that are given a voice on the question, they are required to be freeholders.

The convenience, safety, and protection of a resident landowner in the territory may be, and very likely is, different from that of a non-resident landowner in the territory. The one may be interested in and need police and fire protection, water, light, and gas, which the city might afford to him on slight cost, whereas the non-resident might not desire or have any use for such things, and hence, ought no more, in justice, to have a voice in preventing the residents from securing these advantages, than he should be allowed a vote on the levy of a local school tax in that territory, simply because he owned property therein. Therefore, the grant of the right of appeal to the resident freeholders only is not a grant to any citizen or class of citizens privileges or immunities which, upon the same terms, do not equally belong to all citizens.

The terms upon which they are to have a voice in the annexation is such an interest therein as a resident has.

But it is insisted that the non-resident has an interest as a taxpayer. His relation to the public or to the State as a taxpayer is not changed by being transferred from one political subdivision of the State to another. *Stilz et al. v. City of Indianapolis et al., supra.*

It is true, such transfer makes him liable to taxation in the city, but it only changes his liability as to local taxation. His liability to State and county taxation remains unchanged. While annexation makes him liable to city taxation for local purposes, he is freed from local taxation in the township or political

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subdivision wherein he was taxed before annexation. But it is earnestly urged that city taxation must be so much higher in the city than outside of it that his rights as to the burdens of taxation are seriously and materially affected by annexation.

That, however, is a matter that the courts can take no judicial cognizance of, unless they also take cognizance of the fact that the benefits to be derived from the expenditure of public money raised by taxation in the city would be correspondingly increased, so that in either event the rights of such taxpayer are not affected by such transfer. *Stilz et al. v. City of Indianapolis et al.*, *supra*; *Kelly v. City of Pittsburg*, 104 U. S. 78.

What we have already said almost disposes of the alleged conflict of the statute with the clause in the fourteenth amendment to the Constitution of the United States, which provides that: "nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Due process of law and equal protection of the laws are distinct and independent rights secured to each individual by this constitutional provision, as appellee's learned counsel contends.

But it results almost inevitably from what we have before said, that annexation of territory to a city is not a taking of the property, nor does it deprive any person of his property. Such is now the settled law in this State and by the Supreme Court of the United States. *Kelly v. Pittsburg*, *supra*; *Stilz et al. v. City of Indianapolis et al.*, *supra*; *State, ex rel., v. Cincinnati*, 27 L. R. A. 37, and note; 1 Beach Pub. Corp., section 398 and authorities there cited.

Therefore, there is no question of due process of law involved in the case.

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The constitution of Missouri gives the right of appeal from the circuit to the Supreme Court of the state, except in certain counties, including St. Louis and some others adjacent thereto named, and the city of St. Louis. In those counties, and in that city, an appeal lies to the St. Louis Court of Appeals instead of the Supreme Court of the state. The Supreme Court of the United States held this no denial of the equal protection of the law. *Missouri v. Lewis*, 101 U. S. 22. In *Hayes v. Missouri*, 120 U. S. 68, Mr. Justice Field, speaking for the court, said: "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited, either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed." To the same effect are *McPherson v. Blacker*, 146 U. S. 1; *Soon Hing v. Crowley*, 113 U. S. 703. We have already seen that all owners of land in the territory to be annexed are, by the statute in question, treated alike under like circumstances and conditions, and hence it does not deprive anyone of the equal protection of the laws.

Therefore, the statute does not violate the fourteenth amendment to the Constitution of the United States.

It follows, from what we have said, that the complaint of the appellee did not state facts sufficient to constitute a cause of action, and therefore the circuit court erred in overruling the demurrer thereto.

The judgment is reversed and the cause remanded, with instructions to sustain the demurrer to the complaint.

State, *ex rel.* Davidson, *v.* Miller, Treasurer.

STATE, EX REL. DAVIDSON, *v.* MILLER, TREASURER.

[No. 17,470. Filed June 9, 1896.]

DELINQUENT TAXES.—*Deduction of from County Order.*—Delinquent taxes against the payee of a county order may be deducted by the county treasurer from an order presented for payment where such order, issued and accepted by the payee, contained the provision that the same was allowed subject to all delinquent taxes owing by payee.

From the Tippecanoe Circuit Court. *Affirmed.*

R. P. Davidson, for appellant.

W. A. Ketcham, Attorney-General, *J. B. Milner* and *W. R. Harrison*, for appellee.

MONKS, C. J.—Upon motion and affidavit of relator, an alternative writ of mandate was issued by the court below, commanding appellee, treasurer of Tippecanoe county, to pay relator certain county orders, payable to the relator for services as coroner of said county, or show cause, etc. Appellee appeared and filed a return to said writ, which was in substance that said warrants were issued, subject to all delinquent taxes owing by relator for State, county, township, and other purposes, and that, at the time the relator presented the county orders mentioned to appellee and demanded payment, that there was in the hands of appellee, for collection, delinquent taxes against the relator which amounted to \$31.97, certified by the auditor of said county as correct after the third Monday in April, 1893; that when said relator presented said county orders for payment, appellee offered to pay the same less the amount of relator's delinquent taxes and to give him a receipt for said taxes, but relator refused to accept such payment or permit such deduc-

State, *ex rel.* Davidson, v. Miller, Treasurer.

tion; that appellee, as such treasurer, has at all times been ready and willing to pay said county orders, by giving said relator tax receipts for said delinquent taxes, and to pay him the balance due on said orders when presented for payment. To this return a demurrer for want of facts was filed and overruled, to which ruling an exception was taken. Appellant refusing to plead further, judgment was rendered in favor of appellee.

The only error assigned calls in question the action of the court in overruling appellant's demurrer to the return to the alternative writ.

The relator admits, by his demurrer, that when he presented his orders to appellee that he justly owed \$31.97 delinquent taxes, and that the same was properly in appellee's hands for collection, and also that said warrants issued to and accepted by him contained a provision that the amount stated in each was allowed subject to all delinquent taxes owing by relator, the payee of said warrants, for State, county, township, and other purposes.

Appellant having accepted said warrants containing the provision that his delinquent taxes should be deducted before payment to him, that is, that said taxes should be a payment on the warrants for the amount thereof, he is bound thereby. His rights are governed by the terms of the warrants he seeks to enforce.

He was only entitled to demand and receive from appellee, as county treasurer, the amount of said warrants less his delinquent taxes. The duty of appellee, under the provisions of the warrants, was to give appellee a receipt for the amount of his delinquent taxes and pay the balance due on the warrants in money. This the appellee, as shown by the return to the alternative writ, offered to do.

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Whether the board of commissioners erred in allowing relator's claim subject to the payment of the delinquent taxes is not the question here. If the allowances were so made to the relator by the board of commissioners and were erroneous, the same could have been corrected by an appeal to the circuit or superior court.

By accepting the warrants containing the provisions named, issued by the auditor on said orders of allowance, the relator agreed thereto, and cannot now complain. He predicates his right to recover in this action upon said warrants, and can only recover according to the terms thereof.

There was no error, therefore, in overruling the demurrer to the return to the alternative writ.

Judgment affirmed.

MORGAN ET AL. *v.* WORDEN ET AL.

[No. 15,820. Filed November 22, 1892.]

SPECIAL FINDING.—Practice.—Fraudulent Conveyance.—When there is a special finding of facts in the court below, this court considers only the inferential or ultimate facts it contains and gives no heed to mere matter of evidence; and when in an action to set aside a conveyance as fraudulent the special finding does not state fraud as an ultimate fact the action must fail.

CHATTEL MORTGAGE.—Fraudulent Consideration.—Where a chattel mortgage is executed to secure the claim of several creditors, an honest creditor does not lose his security because the mortgage constituting the security embraces the separate claim of a party who participated with the mortgagor in perpetrating a fraud, where such claims were distinct and divisible.

VOLUNTARY ASSIGNMENT.—Mortgage.—Neither the execution of a mortgage to secure an existing debt, nor the transfer of a specific chose in action to secure or pay a debt, amounts to a voluntary assignment within the meaning of the statute providing for voluntary assignments.

146	600
147	320
145	600
154	228
156	629
145	600
157	18
157	658
145	600
160	606

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From the Allen Superior Court. *Affirmed.*

L. M. and H. W. Ninde, for appellants.

Worden & Morris, for appellees.

ELLIOTT, J.—The material facts stated in the special finding are these: In July, 1887, Harry L. Worden and John F. Zent formed a partnership under the firm name of Worden & Zent. Worden borrowed from his mother \$1,000.00 and executed to her his promissory note for that sum. The appellants sold to the firm of Worden & Zent goods to the value of \$1,200.00. When this action was begun, Worden & Zent were indebted to McIntosh, Huntington & Co. in the sum of \$193.00, and to other persons in divers sums. Anna Worden, the mother of Harry L. Worden, was born in the year 1829. On the 2d day of June, 1884, James L. Worden, the husband of Anna Worden, and the father of Harry L. Worden, died intestate, leaving besides his widow and the son just named, two sons, Charles and James. The three sons conveyed to their mother, on the 13th day of June, 1884, a life-estate in the principal part of the real estate of which their father died seized. On the 2d day of January, 1885, James sold his interest in the land to his brothers, Harry and Charles. Afterwards, on the 11th day of May, 1888, the mother and the two sons, Charles and Harry, sold and conveyed the land for \$10,000.00, receiving in cash the sum of \$4,000.00, and a mortgage for the \$3,500.00. The remainder of the purchase-price was paid by the assumption by the purchaser of an incumbrance upon the property. The cash received was paid to Mrs. Worden, who used \$1,440.00 of the money in paying delinquent taxes, physicians' charges and living expenses. During the period intervening between January, 1886, and May, 1888, Harry L. Worden became indebted to his mother, in addition to the

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money borrowed of her, in a sum aggregating \$500.00. On the 10th day of May, 1888, Harry L. Worden executed promissory notes to his mother for the amount of his indebtedness, which accrued after the date of the note executed for the money borrowed. In payment of those notes and of \$300.00 of the money borrowed, he assigned to his mother his interest in the mortgage heretofore mentioned, and also conveyed to her a lot in the city of Fort Wayne. On the same day Worden & Zent executed to the appellants and other creditors a chattel mortgage. This mortgage was executed to secure the claim of appellants, the remainder of the borrowed money due Mrs. Worden and the claims of other creditors of the firm and its individual members. The indebtedness of the firm of Worden & Zent, at the time the mortgage was executed, was \$1,900.00. On the day the chattel mortgage was executed Worden & Zent assigned its property to one of its creditors. The appellants and the appellees knew of the indebtedness and insolvency of Worden & Zent, but supposed the assets of the firm would pay the secured claims. The appellants, upon ascertaining that the partnership assets were insufficient to pay their claim, repudiated the contract under which the chattel mortgage was executed. For some time prior to May 10, 1888, Worden & Zent were insolvent. Charles Worden acted as the attorney for his mother and his brother. The assignment and the conveyance executed by Harry L. Worden to his mother were upon a fair consideration, and they were executed to constitute her a preferred creditor.

The court stated in substance, these conclusions of law: 1st. That the appellants were entitled to recover of Worden & Zent the amount of their claim, and that other creditors were entitled to like recoveries upon their respective claims. 2d. That the con-

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veyance and assignment to Anna Worden are valid. 3d. That a note for \$70.00, executed by Zent and included in the chattel mortgage was fraudulent.

The facts stated do not authorize the conclusion, even as matter of evidence, that either Mrs. Worden or her son was guilty of fraud. The finding declares that the assignment and the conveyance were executed upon a fair consideration and for the purpose of preferring Mrs. Worden. It is well settled that an insolvent debtor may prefer a creditor.

We cannot, however, resort to evidentiary inferences, for the question arises upon a special finding. Where there is a special finding the court considers only the inferential or ultimate facts it contains and gives no heed to mere matters of evidence. See authorities cited Elliott App. Proceed., section 757. Under this settled rule it has been often held that where fraud is essential to a recovery it must be stated as an inferential or ultimate fact. *Sickman v. Wilhelm*, 130 Ind. 480; *Farmers, etc., Co. v. Canada, etc., Co.*, 127 Ind. 250, 270; *Fletcher v. Martin*, 126 Ind. 55, 57; *Cicero Township v. Picken*, 122 Ind. 260; *Kirkpatrick v. Reeves*, 121 Ind. 280; *Wilson v. Campbell*, 119 Ind. 286; *Phelps v. Smith*, 116 Ind. 387; *Bartholomew v. Pierson*, 112 Ind. 430; *Stix v. Sadler*, 109 Ind. 254; *Elston v. Castor*, 101 Ind. 426.

The fact, if it be conceded to be a fact well found, that Zent was guilty of fraud in executing a note to his father for \$70.00 and including it in the chattel mortgage, could not, of course, affect the Wordens, nor does it affect the result in this case. The rights of Mrs. Worden and the holder of the note executed by Zent were distinct and severable, and as to her, the chattel mortgage is valid. An honest creditor does not lose his security because the mortgage constituting the security embraces the separate claim of a

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party who participated with the mortgagor in perpetrating a fraud. If the claims and actions of the mortgagees were not distinct and divisible quite another question would confront us, but here they were entirely separate and distinct. It is settled beyond debate that where a good-faith creditor has no knowledge of the fraudulent intent of the debtor his security is valid. Here, Mrs. Worden was the holder of a valid claim against one of the mortgagors, so that she was not a voluntary mortgagee, and, being entirely free from any wrong, she is entitled to enforce the mortgage so far as it secures her claim.

Zent was not guilty of fraud in joining with his partner in executing a mortgage to secure a debt justly due from his partner. *Fisher v. Syfers et al.*, 109 Ind. 514. And, certainly, Mrs. Worden was not guilty of fraud, since she did no more than accept security for a debt justly due her.

A pre-existing debt is a valuable consideration for a contract. *Hewitt v. Powers*, 84 Ind. 295. A mortgage executed to secure a subsisting debt is supported by a valuable consideration, but it will not, as a general rule, prevail against one who occupies the favored position of a *bona fide* purchaser. *Gilchrist v. Gough*, 63 Ind. 576, 584; *Busenbarke v. Ramey*, 53 Ind. 599; *Dunham v. Craig*, 79 Ind. 125. The appellants, however, are in no sense *bona fide* purchasers; they are ordinary creditors, and against them a mortgage to secure other creditors is valid. *Boling v. Howell*, 93 Ind. 332; *Louthain v. Miller*, 85 Ind. 161.

The authorities referred to by appellants' counsel do not oppose our conclusion.

There is no fact stated in the special finding indicating that Worden & Zent intended or designed to defraud the appellants, or anyone else, from whom they might subsequently purchase goods, so that the

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authorities cited was bearing upon that point are not relevant.

There was no assignment for the benefit of creditors under the statute providing for voluntary assignments by insolvent debtors. The execution of a mortgage to secure an existing debt is not such an assignment, nor is the transfer of a specific chose in action to secure a debt, or to pay a debt, a voluntary assignment under the statute. *Gilbert Assn. v. McCorkle et al.*, 110 Ind. 215; *Cushman v. Gephart*, 97 Ind. 46; *Carnahan v. Schwab*, 127 Ind. 507, and cases cited.

It is unnecessary to decide whether the appellants are in a situation to impeach the chattel mortgage they assisted in procuring, for, irrespective of the question of estoppel, this appeal must fail.

Judgment affirmed.

HEIM v. STATE, EX REL. BRAMMER.

[No. 17,876. Filed September 23, 1896.]

COUNTY COMMISSIONERS.—*Court.*—*Term.*—*Session.*—*Statutes Construed.*—Terms of commissioners' court, as are provided by section 7821, Burns' R. S. 1894 (section 5736, R. S. 1881), imply periods of prescribed duration; while a special "session" of such court as provided by sections 5917, 7822, Burns' R. S. 1894, implies a period of such duration as might be found necessary to the accomplishment of the objects in view.

SAME.—*Special Session.*—*Appointment of Township Trustee.*—At the special August session of the board of county commissioners for the purpose of receiving the reports of township trustees as provided by section 5917, R. S. 1894, such board has no authority to fill a vacancy in the office of township trustee.

From the Warrick Circuit Court. *Reversed.*

Hatfield & Hemenway, for appellant.

J. B. Handy, C. W. Armstrong, J. R. Wilson, J. L. Taylor and *C. W. Handy*, for appellee.

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HACKNEY, J.—At the November, 1894, election, one Nicholas Fehd was elected trustee of Campbell township, in Warrick county, and, after having assumed the duties of said office, on the 8th day of August, 1895, he tendered to the board of commissioners of said county his resignation from said office. By reason of a supposed informality, in addressing said resignation to the board instead of the county auditor, said Fehd did, on the 9th day of August, 1895, tender his resignation of said office addressed to said auditor, and asked it to be submitted to said board. On said 8th and 9th days of August, 1895, said board of commissioners was in session pursuant to the requirements of section 5917, Burns' R. S. 1894, and on each of said days, said resignations respectively having been submitted to them, did designate and appoint, to fill the vacancy caused by said resignations, the relator, Frederick Brammer, who, as to each of said two appointments, filed with said auditor an oath of office and an ample bond. But, deeming it his duty to fill said vacancy, said auditor refused to approve said bonds or either of them, and, on the 9th day of August, 1894, made the appointment of the appellant, Constantine Heim, to fill said vacancy. Heim qualified, gave bond and entered upon the duties of said office. Brammer demanded said office from him; sued the auditor, at the September term, 1895, of the circuit court, to require the approval of said two bonds; and, having thereby obtained the approval of said bonds, he again, on the 22d day of November, 1895, demanded from the appellant the possession of said office, and, on the 29th day of November, 1895, instituted this suit to oust the appellant from said office. The questions arising upon the record are assigned upon the rulings of the circuit court in overruling the appellant's demurrer to the complaint, and in sustaining the appel-

Heim v. State, *ex rel.* Brammer.

lee's demurrer to the appellant's answer. The facts as we have stated them, so far as they relate to the appointment of the relator, are stated in the complaint, and so far as they relate to the appointment of the appellant are alleged in the answer.

Briefly stated, the question at issue is as to where, under the circumstances, the power to fill the vacancy was lodged. By section 8071, Burns' R. S. 1894 (section 5996, R. S. 1881), it is provided that "All vacancies in the office of township trustee shall be filled by the board doing county business in term time, or by the auditor in vacation." By section 5917, R. S. 1894, the board is required to "hold a session" on the first Monday of August, to receive the reports of trustees, of receipts and expenditures of school revenues for the year ending on the 31st day of July.

The terms of the commissioners' court are required to be held in March, June, September, and December. Burns' R. S. 1894, section 7821 (R. S. 1881, section 5736). Such terms have always been recognized by the courts, the legal profession and the public as the *regular terms*. They are regular in the sense of occurring with uniformity upon the periods prescribed, and they are general in the sense that the general public business, within the jurisdiction of that court, may then be transacted. "Special sessions of the board * * * may be called whenever the public interest requires it, * by the county auditor." Burns' R. S. 1894, section 7822 (R. S. 1881, section 5737). "Terms" imply periods of prescribed duration and, following this implication, the legislature prescribed the limits of such regular terms. Burns' R. S. 1894, section 7821.

While the word "session" may possibly be employed as synonymous with "term," it is manifest that the word, as employed in Burns' R. S. 1894, section

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5917, and Burns' R. S. 1894, section 7822, was not intended to prescribe a period of fixed duration but was intended to imply an indefinite period, of such duration as might be found necessary to the accomplishment of the objects in view. Cases have been cited defining the jurisdiction of the Board as conferred by Burns' R. S. 1894, section 7822, notably the cases of *Hufford et al. v. Conover*, 139 Ind. 151, and *White v. Fleming*, 114 Ind. 560; but since the scope and purpose of that statute are not involved in this case, the citations cannot aid us. That statute makes no reference to the character of the business which may be transacted at the special sessions authorized. The statute here involved provides for sessions recurring at a prescribed period each year, without regard to the opinion of the auditor, and with no notice of or call for such sessions, and for the prescribed purpose of receiving reports from trustees of school revenues. These sessions are regular, with respect to the time of convening, they are special with reference to the business to be transacted, and they are in no sense general as are the terms provided by Burns' R. S. 1894, section 7821. Indeed, there is no excuse for calling such sessions "terms," since they are not of prescribed duration, and are, by the language of the statute, made sessions for the transaction of a particularly specified business.

Boards fill vacancies in the office of township trustee "in term time;" a time not contemplated by section 5917, Burns' R. S. 1894.

A former statute, R. S. 1881, section 4441, required a session of the board in October, instead of August, for the purpose of receiving the reports of trustees concerning school revenues. That statute was, excepting the difference in dates of sessions, identical with the present statute, Burns' R. S. 1894, section

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5917. Under that statute a question arose as to the power of the Board to transact business other than that for which the session was specially designated, and it was held in *Fahlor v. Board, etc.*, 101 Ind. 167, that "The board has no power at such sessions, to transact any other business." The decision in that case was expressly followed in *Johnson v. Board, etc.*, 107 Ind. 15.

Neither upon the language of the statutes cited, nor upon the authorities construing them, can we find support for the rulings of the trial court.

The judgment, therefore, is reversed, with instructions to overrule the appellee's demurrer to the appellant's answer, and to sustain the appellant's demurrer to the complaint.

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[No. 17,608. Filed May 26, 1896.]

145	609
148	52

INDICTMENT.—*Sufficiency Of.*—*Embezzlement of County Funds by Deputy County Treasurer.*—An indictment against a deputy county treasurer, charging him with embezzlement of county funds, is not bad, for the reason that the indictment charged that the money so embezzled was the property of the county.

SAME.—*Statute of Limitations.*—*Statute Construed.*—*Embezzlement.*—*Answer.*—An indictment against a deputy county treasurer, for embezzlement of county funds, returned in November, 1898, when such deputy served as such officer from August 18, 1891, to August 18, 1898, is not bad for failure to state the time at which the crime was committed, under section 1825, Burns' R. S. 1894 (section 1756, R. S. 1881); for the reason that time is not of the essence of the offense.

From the Howard Circuit Court. *Affirmed.*

Oglebay & Oglebay, for appellant.

W. A. Ketcham, Attorney-General, and *R. B. Beauchamp*, for State.

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MONKS, C. J.—Appellant was tried and convicted upon an indictment charging that, while he was the deputy treasurer of Tipton county, he embezzled the money and funds of said county, with the collection, receiving, safe-keeping, transfer, and disbursement of which he was charged and intrusted as such deputy treasurer. The indictment was returned under section 1942, R. S. 1881 (section 2019, R. S. 1894), which is as follows:

“Whoever, being charged or in any manner intrusted with the collection, receipt, safe-keeping, transfer, or disbursement of any money, funds, securities, bonds, choses in action, or other property belonging to or under the control of the State or of any State officer, or belonging to or under the control of any county, civil or school township, city, or town in this State, converts to his own use, or to the use of any other person or persons, corporation or corporations, in any manner whatever, contrary to law; or uses, by way of investment in any kind of property; or loans, either with or without interest; or deposits with any person or persons, corporation or corporations, contrary to law; or exchanges for other funds, except as allowed by law, any portion of such money, funds, securities, bonds, choses in action, or other property, is guilty of embezzlement, and, upon conviction thereof, shall be imprisoned in the State prison not more than twenty-one years nor less than two years, fined not exceeding the value of the money or other property embezzled, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period.”

The venue of the cause was, on application of appellant, changed to the court below, where a motion to quash each count in the indictment was overruled. Appellant entered a plea of not guilty, and the trial

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resulted in a verdict of guilty, upon which judgment was rendered.

The errors assigned call in question the sufficiency of the indictment.

It is earnestly insisted that the indictment is not sufficient for the reason that the facts set forth therein show that the money alleged to have been embezzled was not the property of Tipton county, as averred, but was the property of the county treasurer.

This contention of the appellant is based upon the theory that all the money which comes into the hands or under the control of a county treasurer is his individual property, and that he may do with it whatever he pleases; provided he pays all warrants properly drawn against any of the funds in his hands, and accounts to his successor for what may be on hand at the expiration of his term of office.

The title of the county treasurer to the money which he receives as such treasurer is only recognized to the extent necessary for the safety and better security of the funds in his hands, and not for the use or benefit of the officer himself, and is in effect a legal title in a technical and very limited sense. The equitable title to and beneficiary interest in such money is in the county, and the money for which he is held liable upon his bond is really the money of the county. *Rowley, Admr., v. Fair*, 104 Ind. 189. While this was the rule prior to the enactment of section 1942 (2019), *supra*, as between the treasurer and the county and all other persons, the title to such money, legal and equitable, is in the county. *Winchester Electric Light Co. v. Veal, ante*, 506.

In *Rowley v. Fair, supra*, this court held that notes and other evidences of indebtedness which had been taken by a deceased township trustee for money loaned by him were rightfully turned over to his successor in office, and did not belong to his administra-

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tor. As between the appellee and appellant the title to the funds alleged to have been embezzled was in the county.

It was properly alleged, therefore, in the indictment that the money was the property of the county of Tipton. *State v. Moore*, 1 Ind. 548.

Appellant urges that as the indictment was returned in November, 1893, and it is alleged that appellant was deputy county treasurer from August 18, 1891, to August 18, 1893, the presumption is that the embezzlement charged was in the first part of his term, and therefore barred by the two-year statute of limitations. Appellant has not cited any authority that such presumption exists, and we know of none. On the contrary, it is provided by section 1756, R. S. 1881 (section 1825, R. S. 1894), that "No indictment or information shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment, or other proceeding be stayed, arrested, or in any manner affected, for any of the following defects: * * *

"*Sixth.* For any surplusage or repugnant allegation where there is sufficient matter alleged to indicate the crime and person charged. * * *

"*Eighth.* For omitting to state the time at which the offense was committed in any case in which time is not the essence of the offense; nor for stating the time imperfectly, unless time is of the essence of the offense. * * *

"*Tenth.* For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

Under this section of the statute the indictment is not bad for failure to state the time at which the crime was committed, for the reason that time is not of the essence of the offense. *State v. Sammons*, 95 Ind. 22;

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State v. McDonald, 106 Ind. 233, 238; *State v. Patterson*, 116 Ind. 45; *Fleming v. State*. 136 Ind. 149.

Besides, it is expressly averred in the indictment that "the said offense was committed within the two years next preceding the return of the indictment, the exact time and date being to the grand jurors unknown."

We think the indictment was sufficient to withstand the motion to quash without this allegation. This form of pleading time is not to be commended, however. If a time is alleged, it should be within the statute of limitations, but it is not necessary to prove that the offense was committed at the time averred. It is sufficient to prove that the offense charged was committed at any time within the period fixed by the statute of limitations.

There is no available error in the record.

Judgment affirmed.

HOFFMAN ET AL. v. HENDERSON.

[No. 17,700. Filed September 24, 1896.]

145	613
149	445

APPELLATE PROCEDURE.—Pleading.—Complaint.—A complaint in an action to set aside a conveyance as fraudulent which proceeds in one paragraph upon the theory that no consideration was paid by the grantee, and in another on the ground that grantee united with grantor in an attempt to defraud the creditors of the latter and accepted the deed with knowledge of the fraud, is held sufficient when first attacked by an assignment of error on appeal.

BILL OF EXCEPTIONS.—Statute Construed.—Leave given by the court upon overruling a motion for a new trial to prepare a bill of exceptions can not extend back and take up rulings made in the formation of the issues under section 638 Burns' R. S. 1894 (626 R. S. 1881), but applies to and includes only such rulings or decisions of the court made during the trial, and which are authorized to be assigned as reasons for a new trial, and which are so assigned in the motion.

PRACTICE.—Motion to Modify Judgment.—A motion to modify a judgment which is made prior to the rendition of such judgment is properly overruled.

Hoffman *et al.* v. Henderson.

SAME.—*Bill of Exceptions.*—*Appeal.*—An alleged error in overruling a motion to modify a judgment will not be considered on appeal where same is not presented by bill of exceptions.

FRAUDULENT CONVEYANCE.—*Design of Parties.*—Where the grantor and grantee unite in a fraudulent design to defraud the creditors of the former, the conveyance under the law will not be protected, although a full consideration was paid by the grantee.

SAME.—*Evidence.*—In an action to set aside a conveyance as fraudulent a wide range of evidence is permissible in order that the fraud of the particular transaction may be exposed; and it was not error to permit plaintiff to introduce in evidence an alleged fraudulent mortgage executed by defendant to his mother simultaneously with the deed of conveyance to secure a debt represented by a mortgage, but which had been fully satisfied of record for more than ten years prior thereto, and which from the time of the execution until the date of release, a period of more than two years, had never been listed for taxation by mortgagee.

ATTACHMENT.—*Fraudulent Conveyance.*—*Burden of Proof.*—In order to maintain an attachment on the ground of the debtor's fraudulent disposition of property, it is not incumbent upon plaintiff to prove that defendant did not have after such conveyance, sufficient other property subject to execution to pay his debts.

From the Fulton Circuit Court. *Affirmed.*

Enoch Myers, for appellants.

Conner, Rowley & McMahan, for appellee.

JORDAN, J.—Appellee, on March 27, 1894, instituted this action against appellants, Vernet S. and Phillip P. Hoffman, upon a promissory note, executed by them to her on March 20, 1893, for the sum of \$100.00, which note was due at the commencement of the action. She also sought by her complaint to set aside an alleged fraudulent conveyance of real estate, made by Phillip P. to his wife, the appellant, Mary A. Hoffman, on October 18, 1893. The complaint also recites that said Vernet S. and Phillip P. Hoffman, on said 20th day of March, 1893, executed to the appellee three other notes, aggregating \$600.00, none of the latter being due at the commencement of this action. The notes in question, each by their terms provide, that the interest, which is six per cent. from date, shall be

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due and payable annually. After the defendants had appeared in court in response to a summons, the plaintiff (now appellee) filed an affidavit for an attachment in her said action, upon the statutory ground that the defendant, Phillip P. Hoffman, had conveyed and disposed of his property subject to execution with the fraudulent intent to cheat, hinder, and delay his creditors. Upon the filing of this affidavit, and the undertaking required by the statute, a writ of attachment was duly issued, under which certain real estate, being the same described in the complaint, was levied upon, and attached as the property of Phillip P. Hoffman. On the issues joined between the parties upon the complaint and the proceedings in attachment, a trial was had before a jury, which resulted in a finding for the plaintiff upon the note due, and a finding of the aggregate amount that would be due upon the other three notes at maturity, and also in favor of plaintiff on her attachment proceedings.

At a subsequent term, the court, over a motion by appellants for a new trial, rendered a judgment for \$159.72 "now due;" and for further specific sums of money to become due on the three notes recited and set out in the complaint; the dates when said notes would be due were set out in the judgment. The court also in the judgment ordered the real estate attached to be sold and the proceeds arising from such sale to be first applied to the payment and satisfaction of costs and the sum then due, and next to the payment of the sums to become due in their order. Appellants in this court have assigned a series of errors. The first assails the sufficiency of the complaint. The second is based upon the action of the court in overruling a motion to strike out parts of the complaint, the third predicates error upon the overruling of a motion to separate the complaint into four paragraphs, and

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the fourth and fifth, respectively, aver that the court erred in overruling a motion to modify the judgment, and in overruling the motion for a new trial. We will consider these alleged errors in their order.

The complaint is in two paragraphs. The first seems to proceed upon the theory that no actual consideration was paid by the grantee for the land in controversy, and the second that she united with her husband in this attempt to defraud his creditors, and accepted the deed with the knowledge of the fraud. Under a well settled rule the complaint is sufficient when attacked for the first time by an assignment of error.

The second alleged error, counsel for appellants virtually concede is not a reversible one, for he says: "It seems to be an established rule of this court to in no case reverse a judgment upon an adverse ruling on a motion to strike out part of a pleading." We must accept his concession upon this point, and deny his contention that the rule is a "dangerous one." We cannot consider the alleged error of the court in overruling the motion to require the plaintiff to further paragraph her complaint, for the reason that the motion is not embraced in a proper bill of exceptions; neither is the exception to the ruling therein verified by such a bill. The record does not disclose that at the time the exception was taken to this ruling that time was granted to reduce the exception to writing. It is true, that at a term of the court subsequent to the one at which the ruling upon this motion was made, and at the time when the court overruled the motion for a new trial, sixty days were granted to file their bill of exceptions. This bill was filed in vacation, within the time given, and the motion to paragraph, with the decision of the court thereon, is embraced therein, as is the exception to the ruling. This procedure was not authorized by section 638, Burns' R. S.

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1894 (section 626, R. S. 1881). This section provides: "The party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court. * * * *Provided*, that if a motion for a new trial shall be filed in a cause in which such decision, so excepted to, is assigned as a reason for a new trial, such motion shall carry such decision and exception forward to the time of ruling on such motion, and time may be then given by the court within which to reduce such exception to writing." It is manifest, from the reading of this section, that leave given by the court upon overruling a motion for a new trial, cannot extend back and take up rulings made in the formation of the issues. By the express terms of this statute it applies to and includes only such rulings or decisions of the court made during the trial, and which are authorized to be assigned as reasons for a new trial, and which are so assigned in the motion. See Elliott App. Proced., section 813; *Ryman v. Crawford*, 86 Ind. 262. A bill of exceptions, for the filing of which no time has been given, cannot be filed after the term. *Marshall v. Beeber*, 53 Ind. 83; *Whitworth v. Sour*, 57 Ind. 107.

The motion to modify the judgment appears, from the record, to have been made and denied, prior to the rendition of the judgment. This was premature, and for this reason, at least, it was properly overruled. For another sufficient reason we cannot consider this alleged error. As there is no bill of exceptions showing appellants' objections to the judgment, or the exception to the court's ruling upon the motion to modify, this was necessary. *Adams v. La Rose*, 75 Ind. 471; *The People, etc., Assn. v. Spears*, 115 Ind. 297.

No time was granted in which to reduce to writing the exceptions taken to the ruling of the court, upon

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this motion, but an attempt was made, in like manner as was done in the ruling upon the motion to paragraph the complaint, to verify the same by the bill of exceptions, filed under the leave granted at the time the motion for a new trial was overruled. This procedure, for the reasons heretofore stated, was not authorized.

Appellants next insist that they should have been awarded a new trial upon the several grounds stated in their motion. They contend that the verdict of the jury is not sustained by sufficient evidence. It was agreed by the parties that the amount due at the time of the trial was \$162.25. The main controversy applied to the execution of the alleged fraudulent deed. It appears from the evidence that Phillip P. Hoffman is the father of his co-appellant, Vernet S., and that Mary A. is the wife of Phillip P. and the mother of Vernet S. Hoffman. The notes in suit were executed by the father and son in settlement of a paternity suit which appellee had instituted against the latter. They were executed in March, 1893, and it appears that without having been secured by Phillip P. Hoffman they would have been virtually worthless, as Vernet S. Hoffman was insolvent. On October 18, 1893, Phillip P., who was then the owner of the eighty acres of land in dispute, went with his wife some ten miles to the town of Rochester, and there, at the office of an attorney at law, executed to her a deed for the land. On the same day, and seemingly as a part of the same transaction, Phillip P. and his said wife executed, to the mother of the former, a mortgage, to secure about \$1,400.00 upon a tract of land of forty-four acres, being the only remaining real estate owned by Phillip P., which tract adjoined the land conveyed to his wife; the two tracts together constituting a valuable farm, upon which he and his wife resided. After the execution of the deed to his wife, it appears that Phillip P. had

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not sufficient property left subject to execution to pay his debts. The consideration recited in the deed to the wife is \$2,000.00, and it was claimed by the appellants upon the trial that the consideration arose out of an indebtedness due from the husband to the wife for sums of money loaned or advanced to him by her after their marriage in the years of 1868, and 1876. There is evidence in the case tending to establish this claim, while upon the other hand there is also evidence tending to show, or which supplies grounds for a legitimate and reasonable inference, that these sums of money were a gift upon the part of the wife to her husband, and not in reality treated or considered by the parties as loans, and at the time of the execution of the deed, these sums of money did not constitute a *bona fide* existing debt due from the husband to the wife. Again, there is evidence and circumstances tending to show, or from which it may be legitimately inferred, that the conveyance in controversy was fraudulent, of which fact the wife had knowledge, and accepted the deed for the purpose of protecting the lands in question from the demands of her husband's creditors. Appellants insist that it is shown that a full consideration was paid by Mrs. Hoffman for the land. However, it is settled by the repeated decisions of this court, that where the grantor and grantee unite in a fraudulent design to defraud the creditors of the former, the conveyance under the law will not be protected, although a full consideration was paid by the grantee. *Bishop v. Redmond*, 83 Ind. 157; *Buck v. Voreis*, 89 Ind. 116; *Roberts v. Farmers', etc., Bank*, 136 Ind. 154; *Gable v. Columbus Cigar Co.*, 140 Ind. 563. If the deed is executed by the grantor and accepted by his grantee for the fraudulent purpose of cheating, hindering, or delaying creditors, it may be assailed and set aside by the latter, regardless of the consideration paid. Where the convey-

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ance is effected with such mutual design, the most adequate price paid, or to be paid, for the property will not shield or prevent it from being subjected to the demands of the grantor's creditors. *Gable v. Columbus Cigar Co., supra*. Considering the positive and circumstantial evidence in the case, and the legitimate inferences arising therefrom, we think it is sufficient to support the finding of the jury.

It is contended that the court erred in permitting the appellee to introduce in evidence two mortgages executed by the appellant, Phillip Hoffman, and wife to Catharine Hoffman, the mother of Phillip. The first is the one that was executed simultaneously with the deed to the wife, and the one with which the remaining forty-four-acre tract was encumbered. The second was executed April 23, 1883, to secure, as it seems, the same debt as that of October 18, 1893, was said to secure. It appears that this former mortgage was never listed by the mother for taxation, and on the 9th day of June, 1885, she went to the recorder's office and entered upon the record where it was recorded a full satisfaction thereof. After the lapse of ten years and over, since this satisfaction was declared by her upon the public records, the appellant, Phillip Hoffman, at his own instance it seems, deemed it incumbent upon himself at the same time when he executed the alleged fraudulent deed to his wife, to encumber the only remaining land he held with a mortgage to his said mother, covering, as it did, the same debt embraced in the one she had released as satisfied. The theory or contention of counsel for appellee, is that the mortgage of October 18, 1893, was also a fraudulent act on the part of Hoffman. Upon this view of the case the mortgage of April 23, 1883, with the release thereof under the circumstances may have tended to shed some light, at least, upon the execution of the one subsequent. This latter alleged fraud-

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ulent instrument having been executed at the same time that the deed in dispute was, might serve as evidence tending to prove the fraudulent intent of the grantor in conveying his lands to his wife. Mr. Bump in his work on *Fraudulent Conveyances*, on page 565 (2d ed.), says: "Evidence of other fraudulent transfers at or about the same time of the transfer in controversy is also competent to prove the fraudulent intent of the debtor. * * * There is, moreover, a probable connection in a series of sales nearly at the same time, the result of which is to strip a man of his available property." Fraud is said to assume many shapes, disguises, and subterfuges, and is sometimes so secretly perpetrated, that it can only be detected by facts and circumstances that are apparently trivial. Therefore a wide range of evidence is permissible in order that the fraud of the particular transaction may be exposed. This principle arises from necessity, and is adhered to by courts for the protection of society and benefit of morals. See Bump, *supra*, page 561; Thompson Trials, section 2019. There was no error in admitting these mortgages in evidence. The mortgage of October, 1893, was also admissible under the issues as tending to show the insolvency of the debtor.

Appellants complain of several of the charges given by the court to the jury. Tested by the rule that all of the instructions must be considered as an entirety, and not in parts or fragments, we are of the opinion that they are not open to the objections urged. Appellants especially complain of a part of instruction four. In this charge, after stating the ground upon which the proceedings in attachment were based, and after advising the jury as to the burden resting upon the plaintiff to prove her alleged cause for the attachment, the court said: "It is not incumbent upon plaintiff to prove that after such conveyance the said Phillip Hoffman did not have sufficient other property

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subject to execution to pay his debts." It is to the part which we have quoted that appellants direct their objections. They insist that the plaintiff in order to sustain her attachment proceedings under the averments in the affidavit must show by the evidence, that after such conveyance the debtor did not have sufficient property left subject to execution to pay his debts. This she was not required to do in order to maintain said proceedings. *Flannagan v. Donaldson*, 85 Ind. 517. Under the issue tendered by the complaint as to the alleged fraudulent conveyance which she sought to have set aside, to entitle her to the desired relief, she was required to negative this fact in her pleading, and also by the evidence upon the trial. Proceedings in attachment, however, were unknown to the common law, and are purely of statutory origin. The Civil Code of this State provides that in actions for the recovery of money, that plaintiff at the time of filing his complaint, or at any time afterwards, may have an attachment against the property of the defendant, for any of the enumerated reasons. Burns' R. S. 1894, section 925 (R. S. 1881, section 913). Such proceeding, under our statute, is not an original action, but auxiliary, or incidental, to the main action, and is intended to secure the payment of any judgment that may be recovered therein. While it is true that under this section to maintain an attachment for any of the reasons mentioned in the fourth, fifth, or sixth clauses, the creditor is required to allege in his affidavit and show by the evidence that the attached property is subject to execution. *Blair v. Smith*, 114 Ind. 114. There is nothing, however, in the statute that can be said to cast upon him the burden for which the appellants contend.

We find no available error in the record, and the judgment is therefore affirmed.

Graybeal v. The State.

GRAYBEAL v. THE STATE.

[No. 17,703. Filed September 24, 1896.]

APPELLATE PROCEDURE.—Bill of Exceptions.—Criminal Law.—Affidavits to sustain causes assigned for a new trial in a criminal case, can only be brought into the record by embodying them in a bill of exceptions.

SAME.—Affidavits for New Trial.—When Made Part of Record by Order of Court.—Statute Construed.—Section 662 Burns' R. S. 1894 (section 650 R. S. 1881), which provides that affidavits may be made a part of the record by order of court, relates exclusively to civil actions, and has no application to criminal cases.

From the LaPorte Circuit Court. *Affirmed.*

W. H. Breece, and *Weir & Weir*, for appellant.

W. A. Ketcham, Attorney-General, *O. M. Cunningham*, and *M. Moores*, for appellee.

MONKS, C. J.—Appellant was tried upon an indictment charging him with murder in the first degree, and found guilty of manslaughter, and over a motion for a new trial judgment was rendered upon the verdict.

The only error assigned is that the court erred in overruling the motion for a new trial.

The only cause assigned for a new trial was alleged misconduct of the jury. The affidavit filed in support of the motion for a new trial is not made a part of the record by a bill of exceptions.

Affidavits to sustain causes assigned for a new trial in a criminal case can only be brought into the record by embodying them in a bill of exceptions. *Naanes v. State*, 143 Ind. 299; *Townsend v. State*, 132 Ind. 315; *Meredith v. State*, 122 Ind. 514; *Leverich v. State*, 105 Ind. 277; Gillett's Crim. Law, section 990, and cases cited.

145	623
151	514

145	623
154	651
154	652
155	697
145	623
157	96

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Section 662, R. S. 1894 (section 650, R. S. 1881), which provides that affidavits may be made a part of the record by order of court, relates exclusively to civil actions, and has no application to criminal cases. *Naanes v. State, supra.*

There is nothing in the record to sustain the assignment of error.

The judgment is therefore affirmed.

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[No. 17,764. Filed September 24, 1896.]

145	624
151	467
151	626

145	624
180	207

145	624
151	808
161	808

145	624
e166	5

MECHANIC'S LIEN.—*Who May Hold Lien.*—*When Lien Lost.*—The mechanic's lien law was enacted for the benefit of contractors, mechanics, laborers, and materialmen and when payment is made to such persons by the proprietor himself or by any one else on his order, the right to a lien under the statute becomes at once extinguished.

SAME.—*Mortgage.*—*Priority.*—Under section 3350, Burns' R. S. 1894 (section 2981, R. S. 1881), a mortgage not recorded until several months after its execution and after rights to mechanic's liens had been created against the property so mortgaged, is inferior to such liens although notice of them was not filed until after the mortgage was recorded.

SAME.—*Mortgage.*—*Priority.*—Where one acquires a mortgage lien on property with knowledge of the uses and purposes to which such property was applied by its owner, and with notice that under the statute the mortgaged property was liable to be subjected to after acquired liens for labor and material, or, in case of failing circumstances of mortgagor, to claims which would be preferred debts, whether notice of liens should be filed or not, such statutory provisions enter into and form a part of the mortgage, and the mortgage lien is subject to such statutory liens as may thereafter attach to the property.

SAME.—*Notice.*—*When not Necessary.*—*Statute Construed.*—Under section 7255 Burns' R. S. 1894, when the debtor is in failing circumstances the filing of notice of a mechanic's lien is dispensed with, and all claims become preferred debts as fully as if they had been made liens by notice duly filed.

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From the Henry Circuit Court. *Affirmed in part and reversed in part.*

M. E. Forkner, for appellant.

Fishback & Kappes, L. P. Newby, J. M. Morris, J. L. Lockridge, W. O. Barnard, and Brown & Brown, for appellees.

HOWARD, J.—On this appeal, the controversy is between the appellant, on the one side, as holder of a promissory note secured by mortgage on real estate of the appellee, Joseph S. Jenckes; and, on the other side, certain of the appellees who hold claims against the said Joseph S. Jenckes for work and labor done and materials furnished for him in the construction and operation of a brick making factory upon his said real estate.

From the finding of the facts made by the court, at the request of the parties, it appears: That, on the 8th day of December, 1892, the said Joseph S. Jenckes, being in need of money to be used in the construction of his said factory and to pay liabilities already incurred therein, borrowed of the appellant, his wife, the sum of \$2,500.00, which was then paid over to him by her out of her sole and separate estate; that, at the time of borrowing said money, it was intended to be a temporary loan, but on December 24, 1892, the time of the loan was extended to one year, and the note and mortgage in suit were given to her by her said husband in security for said debt; but the said mortgage was not placed upon record until August 7, 1893; that the mortgage was given and received for the said consideration and in good faith, without any intent by either of said parties to cheat, hinder, or delay the creditors of Joseph S. Jenckes in the collection of their debts against him, or in any other way; that the

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factory was completed and put in operation by the spring of 1893, and all the money for which the mortgage was given was expended by Joseph S. Jenckes in paying for labor, material and machinery in the construction of said plant. It further appears that several of the appellees named, being cross-complainants on the trial, performed work for the said Joseph S. Jenckes in the construction and operation of said brick plant, and received payments therefor from time to time, leaving balances named due them severally at the date of the bringing of this action. Like findings are made in favor of other appellees, also cross-complainants below, for materials furnished by them from time to time and used in the construction of said plant. It is also found that still others of the appellees, being likewise cross-complainants, had similar balances against Joseph S. Jenckes, due them severally for merchandise furnished and sums paid to laborers in said factory on his orders.

It was further found by the court, "That on the 7th day of August, 1893 [the day on which appellant's mortgage was filed for record in the recorder's office], and continuously from that time, the said Joseph S. Jenckes was in embarrassed and failing circumstances, and now is insolvent."

The court found, as a conclusion of law, that the said cross-complainants were severally entitled to recover personal judgments against Joseph S. Jenckes for the balances so found due them respectively; and concluded further in favor of said cross-complainants, "that they and each of them are entitled to hold and do hold a lien for the payment of the sum found to be due each of them respectively upon the following described real estate [naming the land in controversy], as well as upon the buildings and brick factory thereon, and all the machinery and tools therein located

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and used in the business thereof; and that the liens so held by them respectively are each senior and superior to the lien of the mortgage of Mary I. Jenckes."

There was also a conclusion by the court, "That the law is with Mary I. Jenckes as to Joseph S. Jenckes, and that she is entitled to a personal judgment against him for the amount due her from him upon the note sued upon, and to a decree of foreclosure of the mortgage given to secure the same [naming also the amount due her and describing the land aforesaid, to be sold under foreclosure of the mortgage]; and I find that the lien of her mortgage is junior and inferior to the lien of the persons above named and set forth."

The questions discussed by counsel relate wholly to the correctness of the conclusions of law so made by the court.

It is provided in section 1, of the Mechanic's Lien Law in force March 6, 1883 (Acts 1883, p. 140), as amended March 9, 1889 (Acts 1889, p. 257, section 7255, R. S. 1894), under which statute this action was tried: "That contractors, sub-contractors, mechanics, journeymen, laborers and all persons performing labor or furnishing material or machinery for erecting, altering, repairing, or removing any house, mill, manufactory or other building, bridge, reservoir, system of water-works, or other structure, may have a lien separately or jointly upon the house, mill, manufactory or other building, bridge, reservoir, system of water-works, or other structure which they may have erected, altered, repaired or removed, or for which they may have furnished material or machinery of any description and on the interests of the owner of the lot or land on which it stands, or with which it is connected, to the extent of the value of any labor done, or material or machinery furnished, or both, and all claims for wages for mechanics and laborers employed

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in or about any shop, mill, wareroom, storeroom or manufactory, shall be a first lien upon all the machinery, tools, stock of material, or work finished or unfinished, located in or about such shop, mill, storeroom, or manufactory, or used in the business thereof; and should the person, firm or corporation be in failing circumstances, the above mentioned claim shall be preferred debts, whether notice of lien be filed or not."

And in section 3 of said act, as also amended March 9, 1889 (Acts 1889, p. 258, section 7257, R. S. 1894), it is further provided that: "Any person wishing to acquire such lien upon any property, whether his claim be due or not, shall file in the recorder's office of the county, at any time within sixty days after performing such labor or furnishing such materials, or machinery, or article, or thing or consideration, or rendering such consideration described in section 1, notice of his intention to hold a lien upon such property for the amount of his claim, specifically setting forth the amount claimed, and giving a substantial description of such lot or land on which the house, mill, manufactory, or other building, bridge, reservoir, system of water-works or other structure may stand or be connected with or to which it may be removed. Any description of the lot or land in a notice of a lien will be sufficient if, from such description, or any reference therein, the lot or land can be identified."

The mechanic's lien law was enacted for the benefit of contractors, mechanics, laborers, and materialmen; and from any view that might be taken of the facts found by the court in this case it does not appear that these cross-complainants, who upon orders of Joseph S. Jenckes furnished merchandise or made payments to the laborers upon or in and about his factory could be entitled to any lien upon said factory or the land

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upon which it stands. The lien is given to the laborer or materialman "to the extent of the value of any labor done, or material or machinery furnished," in the "erecting, altering, repairing, or moving" of any house or other structure; and if such laborer or materialman is paid either by the proprietor himself or by any one else on his order, the right to a lien under the statute becomes at once extinguished. No question as to assignment of lien is presented by the findings.

As to the other cross-complainants, however, those who furnished labor or material for the erection of the factory, there is no doubt that they were entitled to a lien upon the building and on the interests of Joseph S. Jenckes in the land upon which it stands, and also that the "mechanics and laborers employed in or about" said factory were entitled to "a first lien upon all the machinery, tools, stock, material, or work finished or unfinished located in or about such * * * manufactory, or used in the business thereof," for the several balances due them.

But because said cross-complainants were entitled to such liens, it does not follow that they acquired them. Section 1 of the statute above quoted states the conditions that give a right to the lien; but section 3 of the same statute, referring directly to the provisions of section 1, declares what steps must be taken to acquire such lien. Within sixty days after performing such labor or furnishing such material, the person entitled to the lien must file in the recorder's office "notice of his intention to hold a lien upon such property for the amount of his claim." No such notice was given in this case.

Had such notice been given, there is no doubt that the lien would have related back to the time when work was begun or material furnished. Section 4 of

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the lien law, *supra* (section 7258, R. S. 1894); *Mark v. Murphy*, 76 Ind. 534.

Moreover, as appellant's mortgage was not filed in the recorder's office until August 7, 1893, the lien for labor and material would have related back to that date and to the time when the first labor was performed or material furnished, provided the notice were given within sixty days after August 7, 1893, and the lien thus perfected would have been prior to the lien of said mortgage; for appellant could not, by keeping her mortgage off record, deprive those not knowing of its existence of the right to their liens as against her. Such concealment of her mortgage would have been fraudulent as against such lien holders. Section 3350, R. S. 1894 (section 2931, R. S. 1881); *Jeffersonville Water Co. v. Riter*, 138 Ind. 170.

In addition, it is to be said further that, in so far as such debts are due to mechanics and laborers, it is particularly provided in said section 1 of the statute, that "all claims for wages for mechanics and laborers employed in or about any shop, mill, wareroom, store-room, or manufactory, shall be a first lien upon all the machinery, tools, stock of material, or work finished or unfinished, located in or about such shop, mill, ware-room, storeroom, or manufactory, or used in the business thereof."

The contention of counsel for appellees, however, is that, in this case, although no notice of an intention to hold a lien was given, yet, under the law and the facts as found by the court, the lien is given without notice; and counsel rely in particular upon the concluding clause of section 1 of the mechanic's lien law, already cited, to-wit: "And should the person, firm or corporation be in failing circumstances, the above mentioned claims shall be preferred debts, whether notice of lien be filed or not."

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It was specially found, in this case, that at the date of the filing of appellant's mortgage for record, "and continuously from that time, the said Joseph S. Jenckes was in embarrassed and failing circumstances, and now is insolvent."

Counsel for appellant admits that, under this statute, if there is a fund in the hands of the court, or in the hands of a receiver, assignee, administrator or other trustee, out of which claims against the insolvent debtor are to be paid, the provision of the statute so cited makes the claims of mechanics, laborers and materialmen preferred debts, to be first paid in full as in other cases; but contends "that no specific lien attaches until the court has taken jurisdiction of the property," and that "then it attaches only upon such interests as the debtor then has."

In this case, it is found that George S. Jenckes is "in failing circumstances." Claims for labor and material are found due from him to certain of the cross-complainants. The mill, machinery, etc., for which the materials were furnished, and in and about which the labor was done, together with the land upon which they are situated, are in the hands of the court, to be sold for the payment of such obligations as they are liable for. It would seem, therefore, that the words of the statute apply to the case, that "the above mentioned claims," all the claims referred to in the section of the statute, "shall be preferred debts, whether notice of lien be filed or not." The statute in such case dispenses with the filing of notice, and, in consequence of the failing circumstances of the debtor, makes all such claims preferred debts as fully as if they had been made liens by notice duly filed. The law assumes that the labor and material have gone into the property and enhanced its value "to the extent of the value of" the labor done or the material

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furnished; and, hence, that on the sale of such failing debtor's property this labor and material should first be paid for.

Nor is there any injustice to appellant in this. On the contrary, as said in *Warren v. Sohn*, 112 Ind. 213, she acquired her mortgage lien on the property with knowledge of the uses and purposes to which such property was applied by its owner, and with notice that under the statute the mortgaged property was liable to be subjected to after-acquired liens for labor and material; or in case of failing circumstances, to claims which would be preferred debts, whether notice of lien should be filed or not.

Under the repeated decisions of this court, these statutory provisions entered into and formed a part of appellant's mortgage, and she acquired her lien on the mortgaged property subject to such statutory liens as might thereafter, in the vicissitudes of the mortgagor's business, attach to such property for work and labor done or material furnished, and with notice that, in case of the debtor's failing circumstances, such latter claims might, under the statute, be "preferred debts, whether notice of lien be filed or not." *Bryson v. McCreary*, 102 Ind. 1; *Edwards, Tr. v. Johnson*, 105 Ind. 594; *Long, Ex. v. Straus*, 107 Ind. 94; *Owen School Tp. v. Hay*, 107 Ind. 351. See also *Bass v. Doerman*, 112 Ind. 390.

In considering a similar statute to that now before us, it was said by this court in *Aurora Nat. Bank v. Black*, 125 Ind. 595: "It was the purpose of the Legislature in enacting this statute to secure to employes of corporations an efficient remedy for the collection of money due them for wages. Such statutes are not only constitutional, but they are to be liberally construed with a view of rendering effectual the purpose

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of the statute." Citing *Warren v. Sohn*, and *Bass v. Doerman*, *supra*, and also *Pendergast v. Yandes*, *Rec.*, 124 Ind. 159, 8 L. R. A. 849.

"We are further of opinion," said the court in that case, speaking by Judge Coffey, "that the corporation could not avoid the lien given by statute by transferring its property before the notice of the intention to hold a lien was filed in the recorder's office. Such a construction of the statute would place it in the power of corporations to defeat the purpose the Legislature had in view, as they might, upon approaching insolvency, defeat such liens by selling and transferring all their property. Those dealing with such corporations must know the law and must take notice that the wages of employes is a lien upon their property, and that the title acquired by purchase or otherwise from a corporation is subject to such lien."

In *Goodbub v. Hornung*, 127 Ind. 181, it was held that "the above mentioned claims," as referred to in the concluding paragraph of section 1 of the statute under which this action was tried, include not only debts due laborers for wages, but also debts due mechanics, materialmen, contractors and others, as mentioned in the preceding clauses of said section. See also *McElcaine v. Hosey*, 135 Ind. 481.

It has been well said, following *Aurora Nat. Bank v. Black*, *supra*, that this preference is equal to a first lien upon the property and proceeds thereof, and is superior to the claim of a mortgagee or a *bona fide* purchaser without notice. Any other construction of the statute would place it in the power of the employers to defeat the purpose the legislature had in view, as they might, upon approaching insolvency, by selling and transferring their property. Like observations would, of course, apply to attempts made to defeat the pur-

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pose of the legislature by mortgaging or otherwise encumbering the property.

The general purpose of the mechanic's lien law is to give laborers and materialmen the right to a lien on the property improved by them, to the extent of the value of such labor or material. The lien, the right to which is so given, as a rule, remains inchoate until notice of the intention to hold the lien is given. In case, however, the owner of the property becomes "in failing circumstances," all interests are at once precipitated; there may be no time to give notice, and, by force of the statute, all claims of laborers and materialmen become "preferred debts," or a first lien upon the property. Otherwise the purpose of the law might at any time be defeated by the embarrassment of the owner and the sudden and unexpected sale or encumbering of his property.

The law is, however, only for the benefit of "persons performing labor or furnishing material or machinery for erecting, altering, repairing or removing any house," or other structure; and for "mechanics and laborers employed in or about any shop," or other workroom named in the statute. The law is not intended to protect those who make payments to such laborers or materialmen, on order of the owner of the building or workshop, or otherwise. Business men, merchants and others who make such payments and charge them on general account to the owner of the building or shop in question, are but general creditors of such owner. Such claims may, of course, be assigned, but they carry no lien, unless a lien has first been perfected by the mechanic or materialman in whose favor the right to the lien primarily exists. The right to the lien is in the mechanic, laborer or materialman, and it is only such mechanic, laborer or materialman that may perfect the lien; and it is only

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after the lien has been perfected, as in the case of any other lien, that it may be assigned.

The findings in this case show that the amounts due the cross-complainants, Oscar P. Cook, Rufus P. Walton, Claudius C. Coffin, Margaret Woods, Imla Shewalter, and John V. Bouslog, are for moneys paid by them respectively on orders of Joseph S. Jenckes. These cross-complainants were not mechanics or laborers upon, in or about said brick factory; neither did they furnish material or machinery for its erection. They can therefore have no claim to a lien upon the property, nor are the amounts due them preferred debts.

The decree of the court is therefore reversed, in so far as it gives the above-named cross-complainants first liens in favor of their respective judgments. In all other respects the decree is affirmed; and the several judgments, as against Joseph S. Jenckes, are affirmed.

**ENOCHS v. PITTSBURGH, CINCINNATI, CHICAGO & ST.
LOUIS RAILWAY CO.**

[No. 17,975. Filed September 24, 1896.]

NEGLIGENCE.—Proximate Cause of Injury.—Where a railroad company negligently obstructed a public street of a city with a train of cars, thereby preventing travel across such street for an unreasonable length of time, such obstruction was not the proximate cause of an injury received by a pedestrian who, without negligence in passing around such obstruction, caught her foot on a stone, lying across the gutter between the street and sidewalk, and was injured.

From the Bartholomew Circuit Court. *Affirmed.*

J. W. Donaker, for appellant.

S. Stansifer, for appellee.

145 635
146 507

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161 694

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164 192

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170 231

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171 77

Enochs v. Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co.

MCCABE, J.—The circuit court sustained several demurrers to each of the two paragraphs of the appellant's complaint, and the plaintiff refusing to amend or plead over, the appellee had judgment upon the demurrer.

The two paragraphs are substantially the same. Both seek to recover damages alleged to have been sustained by the plaintiff through the alleged negligence of the defendant.

The substance of the facts alleged is that, the defendant's railroad track runs through the city of Columbus, upon and along Jackson street, running north and south across Ninth street, both of which are public streets in said city; that plaintiff resided on the west side of Jackson street, a half square north of said Ninth street; that on April 27, 1894, after dark, plaintiff was walking from her place of business to her said house, traveling west on the north side of said Ninth street; that when the plaintiff arrived at the intersection of said Jackson and Ninth streets the defendant was wholly obstructing said Ninth street with an engine and train of cars attached thereto, and unlawfully and negligently permitting said train to remain over and across said Ninth street, wholly obstructing travel thereon for more than twenty minutes; that said train extended north beyond any street crossing of said Jackson street; that plaintiff waited on the east side of said railroad track at said north sidewalk crossing of said Ninth street fifteen minutes for defendant to remove its train; being informed by the trainmen that it was not ready to move out, and becoming impatient and being desirous to reach her home, she undertook to go around said train of cars to the south end of the engine and across defendant's railroad track and said Jackson street to her home; that in attempting to pass around said engine,

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without any fault or negligence on her part, the plaintiff caught her foot on a stone lying across the gutter between said Ninth street and the south sidewalk thereof at said Jackson street, whereby she was thrown over said stone violently to the ground, thereby breaking and fracturing the bones of her left arm at the wrist, and otherwise bruising her body.

There were such other allegations as that it is conceded that appellant was shown to be free from contributory negligence.

And it is also conceded that the allegations were such as show that the defendant was guilty of negligence in obstructing the street with the train.

The only question is, was the negligence of the defendant the proximate cause of the plaintiff's injury? If it was not, there can be no recovery against the defendant. (16 Am. and Eng. Ency. of Law, 428-431.) An eminent author states the law as we think correctly thus: "Negligence may, however, be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time. Strictly defined, an act is the proximate cause of an event, when, in the natural order of things, and under the particular circumstances surrounding it, such an act would necessarily produce that event. But the practical construction of 'proximate cause' by the courts, is a cause from which a man of ordinary experience and sagacity could foresee that the result

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might probably ensue." *Sherman and Redfield on Negligence* (3d ed.), section 10.

Tested by this rule, the appellee's negligence was not the proximate cause of appellant's injury.

It is true, that appellant's injury would not have happened but for the appellee's negligence. But that is not the sole ingredient to be considered in determining whether appellee's act was the proximate cause of appellant's injury. *N. Y., etc., R. R. Co. v. Perriguy*, 138 Ind. 414; *McGahan v. Indianapolis, etc., Gas Co.*, 140 Ind. 335, 49 Am. St. Rep. 199; 29 L. R. A. 355.

That the appellant should have come in contact with the stone on which she caught her foot, causing her fall and injury in attempting to go around the obstructing train, would necessarily follow the obstruction; or that ordinary experience or sagacity could foresee that such an accident might probably ensue cannot be affirmed. Appellant mainly relies on two cases. The first is *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166, 40 Am. Rep. 230. The complaint in that case alleged "that the servants and agents of the appellee managed and operated the locomotive and cars of the railway company in such a recklessly and culpably negligent manner, as to willfully and wrongfully cause a team of horses, belonging to one Zero Carter, to take fright and run away, and that, because of such fright, and while unmanageable and running away, they ran against the horse of appellant and caused its death." It was there said: "It is not necessary that the precise injury which actually occurred could have been reasonably anticipated at the time the original wrong was committed. It is true that the resultant injury must be of such a general character as might have been reasonably foreseen and provided against. * * * It is not unusual or unnatural, for horses panic-stricken

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by fear, to run against and injure persons and property, and what is neither unnatural nor unusual the wrong-doer must be held to have anticipated. * * * What is usual, the law requires the person doing a wrong to anticipate and provide against. A wrong-doer cannot escape liability upon the ground that the injury resulting from the wrong was too remote, if it was in fact a usual or probable one. Proximate results are such as are natural or usual."

The company was held liable in that case. But here the injury resulting to the appellant was neither the natural nor usual result to be expected from the appellee's alleged negligence.

The other case is the *City of Crawfordsville v. Smith*, 79 Ind. 308, 41 Am. Rep. 612. That case has no bearing upon the present case.

The city, in that case, was held liable for damages caused by a runaway horse falling into a pit in the street left unguarded by the city.

There is a case in this court which seems almost exactly in point, namely, *Kistner, Exr., v. City of Indianapolis et al.*, 100 Ind. 210. That was a suit against the city and the Union Railway Company to recover for the death of the plaintiff's testator, caused by the alleged negligence of the defendants. Separate demurrers by each defendant had been sustained to the complaint, and this court affirmed the judgment. The first paragraph of the complaint after alleging that seven railroad tracks cross Illinois street into the Union Depot in said city, and that fourteen railroad companies are permitted to use said tracks and depot, the further facts are alleged which show that the city and the railway company had been guilty of negligence in failing to provide safeguards for the protection of persons and teams from injury in passing over said tracks on said Illinois street; it is alleged "that

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the appellant's testator, John G. Kistner, started from his store to go to his dwelling-house, walking on and along the west sidewalk of Illinois street across such seven tracks * * *; that soon after he had started across such tracks, but while he had sufficient time to pass across the tracks upon which the train, herein-after named, was backing, if not wrongfully interfered with or prevented, before any trains, locomotives or cars would reach such west sidewalk, a train of * * * * one of the companies that had the right to and did use the seven tracks aforesaid, commenced backing out of the Union Depot on one of such tracks, and John G. Kistner had passed south of the track such train was backing upon and was entirely clear of and free from any danger from such train if not wrongfully interfered with; that after such train had commenced backing as aforesaid, a wagon and team belonging to the firm of Archdeacon & Co., driven by one of their employes along Illinois street from the part thereof south of the seven tracks, were driven north upon and commenced crossing the seven tracks, and when such employe had got within a short distance of and was approaching the track on which such train was backing, he found that the train had moved so far back that he could not pass it without making a circuit and driving further west near to and upon the west sidewalk of the part of Illinois street crossed by the seven tracks; and to preserve his own life and the lives of his team and save his wagon from destruction, it was necessary that such driver should, and he then and there did, make a circuit and drive the team and wagon further west and near to and upon such west sidewalk and around and abreast of the backing train; and, in so doing, the wheels of the wagon struck the said John G. Kistner and knocked and threw him down under the wheels of

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such moving train, which was backing at the time aforesaid, and the wheels of the cars of such moving train passed over and crushed the body of the aforesaid John G. Kistner, who was then and there and thereby instantly killed.”

All of which, it is alleged, was caused by the negligence of both defendants and without any negligence on the part of the deceased.

The other two paragraphs only differed from the first in that they alleged that the injury occurred through the negligence of Archdeacon & Co., but charge that such negligence was of a character which the defendants ought to have provided against, and failing to do so are liable for all the consequences.

The ruling of the trial court in sustaining the demurrer of the city to the several paragraphs of the complaint was upheld for an additional reason to that given in support of the ruling on the demurrer of the Union Railway Company.

As to the latter ruling it was there said: “We are of opinion, also, that no error was committed by the court in sustaining the separate demurrers of the appellee, the Union Railway, to each paragraph of appellant’s complaint. It clearly appears from the facts alleged in each paragraph, that the proximate cause of the death of appellant’s testator was the act of the driver of the wagon of Archdeacon & Co., whether such act was negligent or otherwise, and, of course, that the negligence of the Union Railway Company, alleged in each paragraph, was not the proximate cause of such death. The intervening agency here was so direct and positive in its nature and effect that the death of the testator cannot be attributed, we think, to the alleged negligence of the Union Railway Company. Here lies the difference, as it seems to us, between the

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case at bar and the case of *Billman v. Indianapolis, etc., R. R. Co.*, *supra*, and *City of Crawfordsville v. Smith, supra*, cited and relied upon by the appellant. Those cases are not in point here, and are not in conflict with what we now decide."

According to these principles, the appellee's negligence was not the proximate cause of the appellant's injury. Therefore, the circuit court did not err in sustaining the demurrer to the several paragraphs of the complaint.

The judgment is affirmed.

HEDRICK ET AL. v. WHITEHORN ET AL.

[No. 17,780. Filed May 8, 1896. Rehearing denied Sept. 24, 1896.]

APPEAL AND ERROR.—*Failure to Save Exceptions.*—Where the ruling suggested by an assigned cause of error is not excepted to, no cause for complaint is presented to the Supreme Court.

SAME.—*Original, Superseded by Amended Pleadings.*—The Supreme Court will not review original paragraphs of a pleading that have been superseded by amended paragraphs.

SAME.—*Amendment of Pleadings.—Discretion of Court.—Record.*—Amendment to pleadings is a question largely within the discretion of the trial court; and the record must disclose what amendment was sought to be made, or the ruling will not be reviewed by the Supreme Court.

From the Brown Circuit Court. *Affirmed.*

Shelby Hedrick, for appellants.

W. C. Duncan and W. J. Beck, for appellees.

HACKNEY, C. J.—The assignments of error are: 1, that the court erred in overruling a motion for the appointment of a committee to prosecute this cause on behalf of the appellant, Wiley Hedrick. 2. "In sustaining a demurrer to appellants' first paragraph of complaint." 3. "The court erred in sustaining a de-

145	642
148	180
151	408
152	555

145	642
164	390

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murrer to appellants' special and third paragraph of complaint." 4. "In refusing appellants' leave to amend their first and third paragraphs of complaint and each of them, and to allow them to make new parties."

The ruling suggested by the first assigned cause of error was not excepted to, and therefore presents no cause for complaint in this court. Burns' R. S. 1894, section 638 (R. S. 1881, section 626); *Johnson v. Eberhart, Sheriff*, 140 Ind. 210.

The record recites the filing of a complaint which is omitted from the record "by the direction of the plaintiff;" then follows what is designated by the record as an amended complaint, in three paragraphs. These paragraphs do not upon their face purport to be amended paragraphs, and they get their designation as such only from the recital of the transcript.

On the 3d day of September, 1894, a demurrer was sustained to the first and second paragraphs of complaint. On the 4th day of September, 1894, an amended complaint was filed, and it is recited that such amended complaint is that so set out in the record. On the 5th day of September, 1894, a demurrer was sustained to the first and overruled as to the second paragraph "of complaint." On the 10th day of September, 1894, an amended first and an additional third paragraph of complaint were filed, but they do not appear in the record, and are referred to by "(here insert.)" On the 21st day of November, 1894, a demurrer was sustained to said two paragraphs. On the 26th day of November, 1894, leave was asked and refused to amend the "first and third paragraphs of complaint." No amendment was tendered, no paragraph as amended was offered, and the record does not show in what respect amendments were to be made.

It will be seen from the record, as above disclosed,

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that the first and third paragraphs of complaint, treated either as original or as amended pleadings, were superseded by another amended first and an additional third paragraph. Neither of the latter paragraphs is in the record unless we should accept the expression of the clerk, "here insert," as having reference to the amended complaint first mentioned above. This we could not do if we would, since it plainly appears that the pleading there referred to was in three paragraphs continuing under a single title and arranged in consecutive order.

Referring again to the assignment of error, it will be seen that the sufficiency of the first and third paragraphs of complaint is assigned and that the sufficiency of amended pleadings is not assigned. There is some confusion in the record as to the third paragraph, whether the ruling complained of related to the paragraph marked "3d" in the pleading, designated by the clerk as the amended complaint or whether it is that designated as the "additional third paragraph."

But there is no confusion upon the fact that the assignment of error refers to the original complaint and does not bring in review any amended pleading.

It is settled practice that amended pleadings take out the original pleading and leave no question for review in ruling upon such original pleadings. *State, ex rel., Jackson*, 142 Ind. 259. It is a self-evident proposition that this court cannot review pleadings which are not in the record. See *Elliott App. Proced.*, section 595.

The fourth assignment of error has no support in the record. Since amendments to pleadings is a question largely within the discretion of the trial court, the record must affirmatively disclose such refusal as will amount to an abuse of that discretion. Without some indication of the amendment desired, the lower court

Johnson *et al.* v. Williams.

would not be properly called upon to exercise its discretion. Here the record does not disclose what amendment was sought to be made. The desired amendment must appear from the record. *Shaw v. Binkard*, 10 Ind. 227; Ency. of Plead. and Pract., Vol. 1, p. 637.

There being no available error in the record, the judgment of the circuit court is affirmed.

JOHNSON ET AL. v. WILLIAMS.

[No. 17,738. Filed May 18, 1896. Rehearing denied Sept. 24, 1896.]

APPEAL.—Practice.—Assignment of Error.—An assignment of error, based upon the overruling of a motion for judgment on the special finding, presents no question for decision in this court, when no motion was made in the trial court for judgment in favor of appellant.

SAME.—New Trial.—Assignment of Error.—When the causes in an assignment of error for overruling a motion for a new trial depend upon evidence, which has not been made a part of the record, no question is presented to this court for decision.

VENDOR AND PURCHASER.—Failure of Title.—Rescission of Sale.—Damages.—Where a vendor negotiated the sale of a body of land, which had been subdivided into five tracts, and conveyed to different parties, including vendor, and such owners executed separate deeds of conveyance for the several tracts of land, the consideration for the several conveyance was paid and secured by payment by grantee of a school fund mortgage on the whole tract, and by paying to each of the grantors a certain sum of money, and by the execution of notes of grantee to the grantors severally, in a suit for the collection of the notes executed to said vendor for the balance of purchase money of his separate tract of land, a cross-action to set aside said several conveyances and rescind said purchase so made, and for damages against vendor, will not lie because of the partial failure of title of one of the said several grantors, where such vendor made no representations as to the title to the lands so conveyed, and intended no fraud upon grantee in connection with the transaction.

Johnson et al. v. Williams.

From the Grant Circuit Court. *Affirmed.*

Harvey & DeWolf, for appellants.

Ratliff & Cline, for appellee.

HACKNEY, C. J.—There are three assignments of error upon the record in this case: 1. Exceptions to the conclusions of law stated upon a special finding of facts; 2. Overruling a motion for judgment in favor of the appellants on the facts so found; and 3. Overruling a motion for a new trial.

The second and third assignments do not properly present any question for decision, since no motion was made in the trial court for judgment in favor of the appellants, and the causes assigned for a new trial depend upon the evidence which has not been made a part of the record.

The facts specially found were, substantially, that in March, 1888, James L. Williams owned a tract of something over one hundred and forty acres of land, adjacent to the town of Upland, in Grant county. This he divided into five tracts, four of which he conveyed to his children; one of the tracts, twenty-five acres, he conveyed to his daughter, "Amy A. Bedwell and her children," she then having two children; one of said tracts, forty acres, he conveyed to John W. Williams. Thereafter, in 1892 or 1893, the Upland Land Company desired to purchase the several tracts so conveyed and that retained by James L. Williams, and to that end its agent entered into negotiations with said John W. Williams for himself and on behalf of his father and the other owners of said lands. It was finally agreed that the several owners would convey said lands to said company for \$19,000.00, part in cash and part on time. At that time there had been no representations as to the title of the lands so conveyed to Amy A. Bedwell and her children, and the

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company made no search of the records and no inquiry as to whether Mrs. Bedwell was the exclusive owner of said twenty-five-acre tract; but, at the execution of the several deeds to the company, the deed so made to Mrs. Bedwell and her children was submitted to the company and inspected by its agents, and said John W. Williams intended no fraud upon said company in his connection with the transaction. Notwithstanding said deed included her children as grantees, she executed a deed of general warranty for said twenty-five-acre tract, her husband joining in the deed, and the respective owners of the four remaining tracts executed deeds of general warranty to said company. The consideration for said several conveyances, so aggregating \$19,000.00, was paid and secured, first by the payment of a school fund mortgage on the whole tract, second by paying to each of the grantors a sum of money, including \$500.00 to Mrs. Bedwell and \$3,400.00 to John W. Williams, and third by the execution to said several grantors of the notes of said company and appellant Johnson, and including one to Mrs. Bedwell for \$1,000.00 and one for \$2,000.00, and to John W. Williams one for \$1,500.00, one for \$1,860.00 and another for \$1,860.00. In like manner several notes were executed to the other grantors respectively. The grantors in the said several conveyances to the company had no interest whatever in any of the several tracts conveyed, excepting that which each so held in severalty as aforesaid. Said several deeds were executed in April, 1893, at which time said company went into, and has ever since continued in possession of said lands. In July, 1893, said company conveyed all of said lands, with other lands, to said Johnson, who, on the 2d of October, 1893, executed a mortgage thereon, excepting said twenty-five acre tract, to the Aetna Life Insurance Company.

Johnson et al. v. Williams.

This action was begun in May, 1894, by the appellee, John W. Williams, upon the three notes so executed to him and the appellants, having sought by cross-complaint to set aside said several conveyances and rescind said purchase so made, brought into court, while the trial was in progress, deeds of reconveyance to said several grantors of said several tracts, which were tendered by the appellants. That said deed to Mrs. Bedwell included her children as grantors, was not known by said John W. Williams, nor by the agent of said company who so negotiated said purchase, until after the execution of said several deeds to said company.

In June, 1894, John W. Williams, as guardian for said two children of Mrs. Bedwell, by proceedings found in detail, sold the undivided two-thirds of said twenty-five-acre tract to said Amy A. Bedwell and conveyed the same to her by suitable deed.

The amount due upon said three notes sued upon was found to be \$5,013.93.

Upon these facts the court stated as conclusions of law that said notes were valid; that the appellants and neither of them should recoup any sum in damages against said John W. Williams, and should not obtain a cancellation of said notes, and that neither of the appellants should recover in this action any of the purchase-money by them paid.

It will be observed that whatever the appellants have suffered has been from the conveyance by Mrs. Bedwell of an interest in the twenty-five-acre tract not owned by her. Just why John W. Williams, who made no false representations, who intended no fraud, and who was ignorant of the ownership, by the children, could be held in damages, has not been made clear to us. Just how the appellants could rescind as to their several grantors, because of the partial failure

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of title as to but one of such grantors conveying a separate tract by a separate deed, and could enforce that rescission in an action to which only one of the several grantors was a party; how that rescission could be made possible with the mortgage to the insurance company standing against all of the lands, save those attempted to be conveyed by Mrs. Bedwell; and how the tender of a reconveyance, for the first time, in the midst of the trial in this cause, could all be enforced have not been disclosed by the argument.

The rule that one who would rescind must act promptly in placing, or offering to place, in *statu quo* the person with whom he has contracted, has been grossly violated by the appellants, both by delay and by encumbering the property.

If this were an action upon the notes executed to Mrs. Bedwell, the argument upon the question as to her liability for broken covenant and the effect of her deed of warranty to carry the subsequently acquired title would be pertinent; but we fail to observe its application to the present case. John W. Williams did not warrant the title of Mrs. Bedwell, and the warranty of his own title is not questioned.

The argument that appellants may hold the lands and, without rescinding, recoup their losses from the breach of warranty by Mrs. Bedwell would be pertinent in an action by her upon the notes executed to her, but without some liability on the part of John W. Williams for damages for fraud or for breach of his covenant, we cannot apply that argument to the present case.

Treating the conveyances as involving one transaction, and as having been made for a single purpose, which would fail by the failure, in the slight degree of the two-thirds of a small fraction of the land, and seeking equitable relief against the loss by such fail-

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ure, at the same time holding the lands conveyed, the plainest principles of equity would have required that such steps be taken as to charge that loss to the party by whose fault it had occurred. John W. Williams being found without fault, and the court not having before it the party at fault, the only decision possible was that made.

We find no error in the record, and the judgment of the circuit court is affirmed.

CARLSON v. THE STATE.

[No. 17,819. Filed September 25, 1896.]

RECORD.—*Bill of Exceptions.—Longhand Manuscript of Evidence.*—The filing of the longhand manuscript of the evidence must be antecedent to its being incorporated into the bill of exceptions.
 SAME.—*Bill of Exceptions.—Instructions.*—Instructions in order to become a part of the record must be copied by the clerk.

From the Tippecanoe Circuit Court. *Affirmed.*
Davis & Bright, for appellant.

W. A. Ketcham, Attorney-General, and *F. E. Matson*, for State.

JORDAN, J.—Appellant was charged by indictment with feloniously entering a certain dwelling house in the day time and attempting to commit a felony therein. Upon a trial before a jury, he was convicted, and over his motion for a new trial, was sentenced, upon the verdict, to be imprisoned in the State's prison. The only error assigned in this court is based upon the overruling of the motion for a new trial.

The questions presented for our consideration by counsel for appellant, relate to the sufficiency of the evidence to support the verdict and to the alleged

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 146 201
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error of the court in giving certain instructions to the jury. We cannot consider and determine these questions upon their merits, for the reason that neither the evidence nor the instructions of which appellant complains are properly in the record. The evidence upon the trial was taken down by an official reporter, and an attempt has been made to certify the original longhand manuscript to this court under section 1 of an act approved March 7, 1873. Acts 1873, p. 194.

The certificate of the trial judge shows that the bill of exceptions was presented to him and signed on November 19, 1895. From the certificate of the clerk it appears that the official report of the evidence, and the bill of exceptions, were filed in his office on November 21, 1895. It is settled by the decisions of this court that the filing of the longhand manuscript of the evidence must be antecedent to its being incorporated into a bill of exceptions by the signature of the judge to such bill. This is the evident requirement of the statute to which we have referred. *DeHart v. Board, etc.*, 143 Ind. 363; *Smith v. State, ante*, 176. An attempt has also been made to incorporate into the bill of exceptions along with the stenographer's report of the evidence, the instructions in controversy, and to certify them to this court in like manner as the longhand evidence, without being copied by the clerk. Such procedure is not authorized.

For the reasons stated, it follows that the evidence and instructions are not in the record.

Judgment affirmed.

 Young *et al.* v. Miller *et al.*

YOUNG ET AL. v. MILLER ET AL.

[No, 17,540. Filed September 29, 1896.]

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150	163

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153	632

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157	187

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161	665
163	265

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165	386

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166	37

WILLS.—Mental Incapacity.—Monomania.—Burden of Proof.—In an action to set aside a will on the ground of mental unsoundness, proof that testator was a monomaniac does not require defendant to show by a preponderance of the evidence that such monomania did not enter into or in any manner control the execution of the will.

EVIDENCE.—Prima Facie Case.—Practice.—A *prima facie* case, made by plaintiff, must always stand unless its force is broken by the defendant's evidence; but the defendant is never required, under the general denial, to negative the truth of the plaintiff's *prima facie* case by a preponderance of the evidence.

WILLS.—Mental Incapacity.—Monomania.—Statutes Construed.—Under section 2726 Burns' R. S. 1894 (2556 R. S. 1881) providing that persons of unsound mind may not execute a will, construed with section 2714 Burns' R. S. 1894 (2544 R. S. 1881) which defines a "person of unsound mind" as an "idiot, *non compos*, lunatic, monomaniac, or distracted person," testamentary capacity is not denied to a monomaniac where the execution of the will is not influenced by such mental aberration.

From the Montgomery Circuit Court. *Reversed.*

Brush & Snyder, Kennedy & Kennedy, and G. F. Harvey, for appellants.

Crane & Anderson, for appellees.

HACKNEY, J.—The appellees sued the appellants to set aside the will of Alfred D. Young, alleging that the testator was of unsound mind and that the will was unduly executed.

Upon the trial, the court charged the jury, among other propositions, as follows: "5. Soundness of mind is presumed to exist in all persons until the contrary is shown, and whosoever would set aside a will because of unsoundness of mind of the testator, must prove such unsoundness to exist. Mere weakness of

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mind is not such unsoundness of mind as will of itself invalidate a will, and a mind that is not capable of making important contracts, or engaging in complex or intricate business matters may nevertheless be competent to make a valid will. What the law requires to make a valid will is, that the testator shall possess mind enough to comprehend the business in which he is engaged, and to know the extent and value of his property and the number and names of the persons who are the natural objects of his bounty; their deserts with reference to their conduct and treatment towards him; to rationally apprehend and consider his relations and natural duty to those who stand nearest to him in blood, and other kindred, and the manner he wishes to distribute his property among them, or to withhold it from them, and that he shall have sufficiently strong and active mind and memory to retain all these facts in his mind long enough to have his will prepared and executed. And in this case, if you find that Alfred D. Young, at the time he executed the will in suit, was possessed of mental faculties to the foregoing extent, then you should find that he was of sound mind, and if not, then you should find that he was of unsound mind.

“9. Under our statute all persons except infants and persons of unsound mind may dispose of their property by will, and the words persons of unsound mind shall be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person, and thus the term unsound mind includes every species of unsoundness of mind. A monomaniac is a person who is deranged in a single faculty of his mind, or with regard to a particular subject only. And it is a fact that persons possessed of monomania may, and often do, on all subjects foreign to the subject of mania, act rationally and with ordinary prudence and judgment.

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While, therefore, monomania is embraced within our statutory definition of what constitutes unsoundness of mind, yet it does not follow that every one possessed of monomania is incompetent to make a valid will.

“10. In this case therefore, *if you find that Alfred D. Young, at the time he executed the contested will, was possessed of monomania, then it will be presumed that he was incompetent to make a valid will, and if it be shown that his mania related to the disposition of his property, or to those who stood in such relation to him as to be the natural objects of his care and bounty, or entered into the execution of his will in any way, then you should find him of unsound mind and return your verdict for the plaintiffs. But, on the other hand, if you find that he was possessed of monomania at the time he executed the contested will, and that the defendants have established, by a clear preponderance of the evidence, that his monomania related to a subject foreign from the disposition of his property and foreign from those who were the natural objects of his care and bounty, and foreign from the subject of his will and from the beneficiaries thereunder, and that at the time of the execution of the will he possessed mind enough to comprehend the business in which he was engaged, to know the extent and value of his property, the number and names of the persons who were the natural objects of his bounty, their needs and deserts with regard to their treatment towards him, and to rationally apprehend his relation to his grandchildren and the manner he wished to distribute his property among them, or withhold it from them, and that he had a sufficiently strong and active mind and memory to retain all these facts in his mind during the preparation and execution of his will, and that his will was in no way af-*

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*fect*ed by his *mania*, then you should find him of sound mind and return your verdict for the defendants.

"11. A man may have sufficient mind to know and comprehend that he is making his will and thereby disposing of his property, giving it to some of the natural objects of his bounty to the exclusion of others, and have an object in so doing which he fully comprehends, and yet be prompted to so dispose of his property by some form of monomania. And if the monomania affected in any way or entered into the making of the will, such will would be invalid, and should be set aside.

"12. A person of unsound mind is incapable of making a valid will, and if you find from the evidence that Alfred D. Young was a person of unsound mind at the time of making his will, it is not necessary for the plaintiffs to show that such unsoundness had anything to do with the manner of disposing of his property. *If unsoundness of mind has been proven to your satisfaction it is incumbent upon the defendants to show, by a preponderance of the evidence, that the unsoundness was of such a character as did not impair the mind of Alfred D. Young to such an extent as to render him incapable of making a will, or that the derangement of his mind in no way affected the disposition of his property or entered into the making of his will.*"

Objections are urged by counsel for the appellants to the charges numbered ten and twelve, while counsel for the appellees contend that any objections there-to are of no avail when they are considered in connection with those numbered five, nine, and eleven.

In the tenth charge the jury were told, by the first proposition in italics, that the want of testamentary capacity is presumed from the existence of monomania, and by the second proposition in italics, they

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were told that the contestees held the burden of showing "by a clear preponderance of the evidence" that such monomania did not enter into or in any manner control the execution of the will and, in addition, that the testator possessed testamentary capacity according to a standard defined. By the twelfth charge the jury were instructed, by the words therein italicized, that if general unsoundness of mind were shown to have existed when the testator executed his will, the burden rested upon the contestees "to show by a preponderance of the evidence" that such unsoundness was not of a character to deprive him of testamentary capacity, and that it in no way affected the disposition of his property. These propositions, as we understand them, are erroneous and are not cured by the other charges.

The issue, upon this branch of the case, was this: Did the testator possess testamentary capacity at the time of the execution of his will? The appellees assumed the burden of showing, by a preponderance of the evidence, that he had not such capacity. The appellants answered by general denial and assumed no burden of an affirmative character. The obligations of the parties were not different from those in the ordinary case where facts are affirmed upon one side and denied upon the other. A *prima facie* case, made by the plaintiff, must always stand unless its force is broken by the defendant's evidence; but the defendant is never required, under the general denial, to negative the truth of the plaintiff's *prima facie* case by a preponderance of the evidence. If, upon the whole evidence, the plaintiff does not have a preponderance, the defendant must recover. If the scales are equally balanced the plaintiff must fail. It is perfectly clear, therefore, that to break the force of a *prima facie* case it is not necessary that the contrary shall be estab-

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lished by a preponderance of the evidence, but that it is sufficient if, from the evidence *pro* and *con*, the plaintiff cannot be said to have a preponderance upon his side of the issue. As to the character of the issue, the presumption, from the presence of monomania and the burden of the issue, in cases of the character of the present, the rules were fully discussed and determined in the case of *Blough v. Parry*, 144 Ind. 463; See also *Teegarden v. Lewis*, *ante*, 98.

It is earnestly and ably contended by counsel for the appellees that, by section 2726, R. S. 1894, persons of unsound mind may not execute a valid will, and that section 2714, R. S. 1894, so defines the phrase "persons of unsound mind," as employed in said section 2726, as to include monomaniacs. In other words, the contention is made that testamentary capacity is denied by statute, and does not exist where the testator is an "idiot, *non compos*, lunatic, monomaniac, or distracted person," regardless of the degree of mental aberration, and whether the will was influenced or controlled by such aberration or not. It has been frequently held since the adoption of these statutes, and correctly so, we have no doubt, that the phrase "unsound mind," as employed in section 2726, *supra*, was employed with reference to the existing and then well understood legal definition of testamentary capacity. That definition has always recognized a mental condition not wholly sound, but possessing the scope and power to comprehend the property subject to bestowal, the natural objects of such bounty, including their just deserts, and to direct and execute a testament bestowing such property without influence from existing mental infirmity. Some of our own cases recognizing and sustaining this definition are *Kenworthy v. Wil-*

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liams, 5 Ind. 375; *Lowder v. Lowder*, 58 Ind. 538; *Wray v. Wray*, 32 Ind. 126; *Durham v. Smith*, 120 Ind. 463; *Burkhart v. Gladish*, 123 Ind. 337; *Harrison v. Bishop*, 131 Ind. 161; *Blough v. Parry*, *supra*; *Teegarden v. Lewis*, *supra*.

In the case of *Blough v. Parry*, *supra*, it was expressly held that the phrase "unsound mind," as employed in the statute of wills, was employed in the sense in which testamentary incapacity was then, and is yet, understood, and not as excluding every possible phase and degree of mental infirmity.

In oral argument counsel for appellees suggest that the instructions are not properly in the record, and cite *McCoy v. Able*, 131 Ind. 417; *Jenkins v. Wilson*, 140 Ind. 544; *Bemnt v. May*, 135 Ind. 664. We find no irregularity in the presentation of the instructions by the record. They were brought in by a bill of exceptions, which is copied into the transcript regularly certified. From the character of the cases cited it is probable that counsel intended to attack the sufficiency of the record to present the evidence, since we find that the bill of exceptions in the transcript is a copy of the original bill in all respects excepting that it includes the original longhand manuscript of the evidence, which was taken from the original bill and inserted in the record at the point in the copied bill which it occupied in the original. Some question exists, in the profession, as to the correctness of that practice, but, since we do not pass upon any of the questions arising upon the evidence, deeming them unimportant, or that they may not again arise, we do not express an opinion as to the method here employed. We may observe, however, that the error in instructions would exist under any evidence possible, within the issues.

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For the error suggested the judgment of the circuit court is reversed, with instructions to grant the motion of the appellants for a new trial.

WILSON ET UX. v. WILSON ET AL.

[No. 17,567. Filed September 29, 1896.]

WILLS.—Election of Widow by Implication.—Estopped From Taking Under the Law.—Statute Construed.—Where a testator devised all of his real estate to his wife during life, the wife being present at the time of the execution of the will and heard it discussed by the testator and draftsman, and after the death of the testator leased the entire farm to her son, from whom she received from year to year one-third of all the products thereof, and during such time made repeated declarations that the land was her own as long as she lived, and that she was to reside thereon during life, and at her death it was to be divided among the children of her deceased husband, and who asserted ownership of the entire farm for a period of nearly ten years, kept up improvements and paid the taxes, during such time executes a written lease in which she declares that she rents and leases "her farm on which she now lives, etc., so long as she may live," such acts and declarations will be held under section 2505, R. S. 1881, to amount to an election to take under the will and not under the law.

SAME.—Election by Widow.—Estoppel.—Where the wife of a testator elects to take under the will she is bound thereby and estopped from exercising any right or setting up any claim or title to the real estate under the law as widow of her deceased husband.

From the Marshall Circuit Court. *Affirmed.*

A. B. Hess, and J. D. McLaren, for appellants.

S. Parker, for appellees.

JORDAN, J.—Appellees instituted this action in the lower court to set aside a deed, executed by Elizabeth Wilson to the appellant, John W. Wilson, whereby she sought to convey a certain interest in fee-simple in the real estate in question. The appellees were successful in this action, and over a motion by appel-

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lants for a new trial, obtained a judgment setting aside the deed in controversy.

The facts alleged in the complaint summarized are as follows: Appellant, John W. Wilson, is the son of Abijah and Elizabeth Wilson, and appellees are their children, some of them being their grandchildren. Abijah Wilson died testate at Marshall county, Indiana, in October, 1880, the owner in fee of the land described in the complaint, leaving surviving him his widow, Elizabeth Wilson. By the last will of said Abijah, which was duly probated on the 16th day of December, 1880, he willed and gave to his said wife, Elizabeth, all his property, both real and personal, the realty being that mentioned in the complaint, with all the proceeds thereof, to hold for and during her natural life, subject to the payment of his debts. After the death of his wife the will provided that all of said property remaining should be sold to the best advantage and the proceeds divided among his children, naming them, subject to certain advancements. After the probate of the will, it is alleged: "that said widow never made any express election in writing by which she signified her intention and purpose to take under said will or under the law, but with a full and complete knowledge of said will, and with a full and complete understanding of its provisions as the same affected her interests, and of her right to accept the provisions of said will and to take thereunder, or to reject the provisions of said will in her favor and take under the law; she, agreeable to the terms of said will, continued in the possession of all of said real estate and personal property from the time of her said husband's death down to the 26th day of September, 1890. She paid all the taxes against said land, and kept up the improvements thereon, and gave out to her said children and persons in the neighborhood that she held

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said property under the will, and that she was to possess and use it until her death. That shortly after the death of her said husband she, by verbal lease, rented all of said lands from year to year to her son George Wilson, until June 10, 1890. The latter held possession thereof, and farmed the same as her tenant, rendering unto her one-third of all the crops raised and produced thereon by him. On said 10th day of June, 1890, by a written contract, she leased all of said land (being the eighty-five acres) devised to her for life, to the appellant, John W. Wilson, for the term of one year, with the privilege of holding it longer, or so long as she might live." It is further averred that "The plaintiffs, relying upon the statement of said Elizabeth, that she took and held said land and said property under said will, and that the same was her own until her death, and upon her conduct and acts herein set out as evidencing her wish, intent and purpose, to take and hold said land and property under said will, never demanded or received any part of the rents or profits of said land, and never demanded, nor had anything done with respect thereto, but suffered and permitted her to use and occupy the land as a life tenant; that by her speech, acts, and conduct, as herein described, said Elizabeth Wilson, prior to September 26, 1890, had fully elected to take and hold said lands under said will, but they say that on said day, disregarding her said election and the plaintiff's rights by reason thereof, she executed a deed, by which she undertook to convey to the defendant, John W. Wilson, the share and interest in all of said lands which would have passed to her under the laws of this State, had she not made her election to take under said will." It is alleged that the deed in controversy was recorded on September 26, 1890, and that the appellant, John W. Wilson, by virtue of said deed, is claiming and pre-

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tending to be the owner of an undivided one-third of said lands, and that this deed, with his claim thereunder, is a cloud upon the plaintiff's interest in and to the said lands, and renders it impossible to sell the same, as provided by the will. It further appears, by the complaint, that Mrs. Wilson, the widow, was appointed as the executrix under the will, but never qualified as such, and that there has been no administration of the estate thereunder; that all the claims against the estate of said Abijah Wilson have been paid, and that said Elizabeth died intestate December 20, 1893.

The evident theory of the complaint, as outlined by its alleged facts, is that the widow, Mrs. Wilson had by implication elected to take and accept the life-estate in the lands bequeathed to her by her husband, and was thereafter estopped from conveying any interest in fee under the law, as she had pretended to do by her deed to the appellant. An answer and cross-complaint were filed by the appellant, and upon request a special finding of facts was made by the court, with a statement of its conclusions of law thereon. There are several errors assigned, and thereunder the appellants complain and say that the complaint is not sufficient, and contend that the finding of the court is not supported by the evidence, and that the conclusions of law are not warranted by the special finding. As to a part of the material facts alleged in the complaint there is no controversy between the parties. Appellant's principal contentions are that the facts as alleged in the complaint, and as they appear from the evidence in the record, do not establish the ultimate issuable fact that Mrs. Wilson had, prior to the execution of the deed to appellant, elected to accept the life-estate in the lands devised to her by the will.

We have carefully read and considered the evidence,

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and the following is believed to be at least a correct summary of it having a bearing upon the question involved: Abijah and Elizabeth Wilson were husband and wife, and the father and mother of the appellant and appellees, excepting those who are their grandchildren. He died in October, 1880, in Marshall county, Indiana, the owner in fee of the eighty-five acres of real estate situated in said county, being the same described in the complaint. He left surviving him his said wife, and the appellant and appellees, his children. The last will and testament of Abijah Wilson, executed in 1879, and probated after his death, on December 16, 1880, and recorded in the office of the clerk of the Marshall Circuit Court, in part is as follows:

“Know all men, etc., I, Abijah Wilson, of the county of Marshall, State of Indiana, make this my last will and testament: First, I bequeath to my beloved wife, Elizabeth Wilson, all my property, both real and personal, together with all the proceeds, during her natural life time, after paying all my just indebtedness. * * * * At the death of my wife, Elizabeth, I desire my property, both real and personal, disposed of to the best advantage (or so much thereof as may be left) and the proceeds thereof divided among my heirs, as hereinafter described,” etc. Here follow directions as to an equal distribution among his children, naming them, subject to a deduction of certain notes which he held against some of his said children. There is evidence showing that Mrs. Wilson was present when the will was executed by her husband—passing in and out of the room in which it was being prepared, engaged in looking for and bringing certain notes that were mentioned and identified in the will.

At the time of the execution it appears that the will was also discussed in her presence. After the death

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of her husband, and the probate of his will, she seems to have exercised complete control over the entire tract of land, occupied it and used it as her own, and rented it to her son George Wilson from year to year for quite a period of time, he rendering unto her as rent one-third of all the products raised thereon. She paid the taxes, and made some improvements on the farm; and repeatedly, during this period, declared to her friends and acquaintances that according to the will of her husband, the land was to be her own as long as she lived. That she was to live on the farm during her life, and when she died it was to be divided among the children. On one occasion, when acknowledging the execution of some instrument before an officer who made some inquiry in regard to her title to the land she said that it belonged to her as long as she lived. In the summer of 1884, in referring to the will, she stated to another party, in substance, that it gave to her the place as long as she lived; that she had the right to take what the will gave her or what the law gave her, but that her husband's will was her will. At another time she said to one of her friends, a Mrs. Warrens, that she had the "place" as long as she lived, and then it was to go to his (her husband's) heirs. She frequently stated to this witness that it was her husband's wish that she remain upon the farm, and that she wished to do so. Some time in 1889 it appears that she desired that George Wilson, one of the appellees, who was her tenant for some time, as heretofore stated, should deliver the possession of the farm to her, and she signed and caused a written notice to that effect to be served upon him, with which demand he seems to have complied. On January 10, 1890, by a written contract entered into between her and the appellant, John W. Wilson, she leased the whole of said farm to him. This lease is in part as follows: "Article

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of agreement entered into this 10th day of January, 1890, between Elizabeth Wilson (wife of Abijah Wilson, deceased), of the first part, and John Wilson (her son), of the second part. The party of the first part this day rents, or leases, her farm on which she now lives, in Union township, Marshall county, State of Indiana, consisting of eighty-five (85) acres, for the term of one year, with the privilege of longer, or so long as she may live,"etc. Here follow certain conditions and stipulations as to the payment of rent and the use of the farm by the lessee. Some eight months after leasing the land to John W., and apparently at his instance, she took legal advice as to her rights therein, and on September 26, 1890, she executed to him a warranty deed, whereby she purported to convey to him a fee interest in and to the land in dispute. This deed in part reads as follows: "This Indenture Witnesseth, that Elizabeth Wilson, etc., widow of Abijah Wilson, deceased, conveys and warrants to John W. Wilson all of her right, title, interest, and estate whatsoever, which she took and inherited under the law, or otherwise owns, as widow of said Abijah Wilson, deceased, in and to the following real estate." Here is given a description of the realty in controversy. Counsel for appellants earnestly insist that the execution of this deed is the first affirmative act of Mrs. Wilson subsequent to the death of her husband, which indicated her intention to take under the law, and not under the will.

Section 2505, R. S. 1881, in force at the time of the probate of the will, provides: "If lands be devised to a woman, etc., by the will of her late husband, in lieu of her right to lands of her husband, she shall make her election whether she will take the lands so devised or the provisions so made, or whether she will retain the right to one-third of the land of her late

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husband; but she shall not be entitled to both, unless it plainly appear by the will to have been the intention of the testator that she should have such lands, etc., thus devised or bequeathed in addition to her right in the lands of her husband." Under this section the presumption is against a double provision being intended by the husband for his surviving widow. It is clear, we think, that the devise in the will of Abijah Wilson to his wife was intended by him to be in lieu of her rights as his widow under the law to his real estate, therefore she was required by this section of the statute to elect whether she would take under the will. *Wilson v. Moore*, 86 Ind. 244, and cases cited.

Prior to the amendment of this section by the act of 1885—see Burns' R. S. 1894, section 2666—if the widow of the deceased testator for whom testamentary provision had been made, remained silent she was presumed to hold under the law, and not under the will. Now, however, since the change in the law by the legislature in 1885, she is not required to elect as formerly to take under the will, but in effect she is required within the time mentioned and in the manner provided to renounce the provisions therein made for her benefit, or her rights will be controlled by the will. *Burden v. Burden*, 141 Ind. 471, and cases there cited.

The act amending this section, by its express terms limits the time in which the election is to be made to one year after the probate of the will, and is only applicable to wills probated after it went into effect. Under section 2505, *supra*, as it existed at the time of the probate of Abijah Wilson's will, the widow might expressly elect to take under her husband's will, or her election to do so might be by implication, inferred from her acts and conduct. An eminent author states

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the rule as follows: "An election may be either express or implied. An express election is made by some single unequivocal act of the party, accompanied by language showing his intention to elect, and the fact of his electing in a positive, unmistakable manner,—as, for example, by the execution of a written instrument declaring the election. As the electing becomes fixed by such a definite act, and at such precise time, no question concerning it can arise." Pomeroy's Equity, Vol. 1, section 514; Am. and Eng. Ency. of Law, Vol. 6, p. 254.

Again it is said: "An election may be also implied—that is, inferred—from the conduct of the party, his acts, omissions, modes of dealing with either property, acceptance of rents and profits, and the like. Courts of equity have never laid down any rule determining for all cases what conduct shall amount to an implied election, but each case must depend in a great measure upon its own circumstances. * * * A recital in a deed may amount to an election or be evidence of an election. * * * Where a widow is required to elect between a testamentary provision in her favor and her dower, an unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable ownership over it, if done with knowledge of her right to elect, and not through a clear mistake as to the condition and value of the property, will be deemed an election by her to take under the will and to reject her dower." *Id.*, section 515.

Where an election is once made by the party bound to elect, either expressly or inferred from his conduct, it binds, not only himself, but also those parties who claim under him, his representatives and heirs. *Id.* Section 516; Am. and Eng. Ency. of Law, *supra*.

A person who has an election between several in-

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consistent courses of action will be confined to the one which he first adopts. Any decisive act of such person done with a knowledge of his rights and of the fact, determines his election and (in the absence of fraud) works an estoppel. It is an old rule of equity, that where one has taken a beneficial interest under a will, he will thereby be held to have confirmed and ratified every other part of the will, and he will not be permitted to set up any right or claim of his own, however legal and well founded it may otherwise have been, which would defeat, or in any way prevent the full operation of the will. *Bigelow Estoppel*, 578; *Lee v. Templeton, Gdn.*, 73 Ind. 315, 324.

Applying the doctrine as stated and laid down by the authorities to which we have just referred, what must be a reasonable conclusion from the acts of Elizabeth Wilson—subsequent to the probate of the will in controversy. It is evident, we think, that she knew of the testamentary provisions made for her by her husband. She was present at the time of its execution, and heard the will discussed by the testator and draftsman. Shortly after the death of her husband she seems to have recognized her right to use and enjoy the entire estate by leasing the farm to her son, George Wilson, from whom she received and accepted, from year to year, one-third of all the products thereof. We have her repeated declarations that the land was her own as long as she lived, and that she was to reside thereon during life, and at her death it was to be divided among the children of her deceased husband. That this was the will of the latter, and that his will was her will. For a period of nearly ten years after the probate she asserted an ownership to the whole farm and a right to the use and control thereof, kept up improvements and paid the taxes, and then, after terminating by a notice to quit the relation

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of landlord and tenant which appears to have existed between her and her son George, she executes a written lease to appellant, wherein she declares that she rents and leases "her farm on which she now lives, etc., consisting of eighty-five acres, for one year, with the privilege of longer, or so long as she may live." Considering these acts and conduct of Mrs. Wilson, especially that of executing the written lease, which embraced and laid claim to the entire farm during her life, and we have a clear manifestation that she was exercising her rights under the will, and had elected to accept the provisions therein made for her. The execution of the latter instrument was an affirmative, positive and unequivocal act upon her part, and, together with all her other acts during the long period preceding it, is incompatible, inconsistent and hostile to the theory and contention of appellant that never, prior to the execution of the deed of conveyance to him, had she indicated her choice to accept the testamentary provisions made for her benefit.

In *Barkley v. Mahon*, 95 Ind. 101, this court held that a widow to whom a life estate in land had been devised by her late husband, manifested her intention to take under the will by claiming such life estate as exempt from execution.

Appellees, who, as we have seen, are the children and heirs of the testator, and to whom he had devised the estate after the termination of their mother's life tenancy, seem to have relied upon her acts and conduct as indicating an election upon her part to take under the will, at least it does not appear that they ever, after the probate of the will and prior to her death, disputed her right to have, use and enjoy, as she did, the lands in question.

Having elected to take under the will prior to the execution of the deed to the appellant, as we are con-

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strained to hold she did, she was bound thereby, and estopped from exercising any right or setting up any claim or title to the real estate under the law as the widow of Abijah Wilson, and by the conveyance in dispute no interest in fee passed to the appellant.

The complaint was sufficient and the conclusions of law authorized by the finding, and the finding is supported by the evidence. After insisting that in executing the deed to appellant Mrs. Wilson was exercising her right, under the law, to convey to him, his counsel seem to espouse a new and different theory, and contend that under the will she took a life estate in the lands with power of alienation in fee of all or a part thereof, consequently, they mildly contend that the deed served as a valid conveyance in fee to the appellant. We need not decide whether the clause in the will reading "or so much thereof as may be left" was intended to empower the widow to sell and convey the land in fee, as it does not appear that she attempted to exercise any right to convey under the will. She distinctly declared, and stated in the deed, that the interest which she was conveying to appellant was that which she took and inherited under the law as the widow of Abijah Wilson.

Appellant complains of the action of the court in excluding certain declarations of Mrs. Wilson, made prior to the execution of the deed in the absence of appellees and while she was in possession of the land to the effect that she had never seen the will nor heard it read, and that all she knew about it was what her son George Wilson had told her. It is sufficient to say that under the issues in this case these were clearly incompetent.

Finding no error in the record, the judgment is affirmed.

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CABINET MAKERS' UNION v. CITY OF INDIANAPOLIS.

[No. 17,735. Filed September 29, 1896.]

DISMISSAL OF ACTION.—Affidavits.—Where a motion to dismiss a cause of action is sustained by the trial court, and the affidavits in support of such motion and the counter affidavits were conflicting, under the long and well settled rule, this court can not weigh the evidence and determine where the preponderance is, but must affirm the judgment of the trial court.

SAME.—Discretion of Court.—The determination of motions to dismiss an action for want of prosecution is largely within the discretion of the trial court, whose action will not be reviewed by this court unless a clear case of abuse of discretion is shown.

From the Marion Superior Court. *Affirmed.*

R. N. Lamb, and *Ralph Hill*, for appellant.

J. B. Scott, and *J. E. Scott*, for appellee.

MONKS, C. J.—Appellant commenced this action January 23, 1883, against appellee, to recover damages alleged to have been caused by the negligence of appellee. April 6, 1883, appellee filed an answer in five paragraphs, and on May 10, 1883, appellant filed a demurrer to the second, fourth and fifth paragraphs thereof, which the court, on June 25, 1883, sustained as to the third paragraph, and overruled as to the second, fourth and fifth paragraphs. No further steps were taken in the cause by appellant until November 27, 1893, when its reply to the second, fourth and fifth paragraphs of answer was filed.

On April 25, 1895, appellee filed its motion to dismiss said action "for failure to prosecute said action with due diligence, that appellant had long since abandoned its cause of action sued upon and set forth

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in its complaint." On May 9, 1895, this motion was sustained and the cause dismissed by the court.

The errors assigned call in question the action of the court in sustaining said motion.

Appellee filed affidavits in support of said motion to dismiss, and appellant filed counter-affidavits, and thereby an issue of fact was presented, which the trial court determined against appellant.

The excuse given for delay in the prosecution of said cause by the counter-affidavits was, that in 1884 counsel for appellant made an agreement with the then city attorney that further proceedings in this cause should be suspended until the final disposition of another cause involving the same questions pending in this court, which was dismissed on confession of error October 28, 1891; that counsel for appellant had no knowledge that said cause had been disposed of until the summer of 1893; that in 1893 said cause was further postponed by agreement with the attorney then representing the city, in order that an effort might be made to try some case involving the same matter, against both the city and the railroad companies.

The affidavits in support of the motion were sufficient to sustain the action of the court, and although they and the counter-affidavits were conflicting, under the long and well settled rule this court cannot weigh the evidence, even if presented by affidavits, and determine where the preponderance is, but the judgment of the trial court must be affirmed. *Williams v. Grooms*, 122 Ind. 391, 393; *Schnurr v. Stults*, 119 Ind. 429, 430; *DeHart v. Aper*, 107 Ind. 460; *Nash v. Cars*, 92 Ind. 216, 220; *Carter v. Ford Plate Glass Co.*, 85 Ind. 180, 189; *Hoag, Admr. v. Old People's, etc., Soc.*, 1 Ind. App. 28, 33; *Wells v. Bradley, Holton & Co.*, 3 Ind. App. 278, 280; *Schofield v. Starnes*, 5 Ind. App. 457,

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458; *Quick v. Lawrence Nat'l Bank*, 10 Ind. App. 523, 524; *Stevens v. Stevens*, 127 Ind. 560, 568; *De Hart v. Etnire*, 121 Ind. 242, 244; *DeFord v. DeFord*, 116 Ind. 523, 525; *Dill v. Lawrence*, 109 Ind. 564, 566 and cases cited; *Epps v. State*, 102 Ind. 539, 555, 556; *Hodges v. Bales*, 102 Ind. 494, 499, 500; *Clayton v. State*, 100 Ind. 201, 205 and cases cited; *Fitzgerald, Tr. v. Goff*, 99 Ind. 28, 44, 45; *Hamm v. Romine*, 98 Ind. 77, 83, 84; *Doles v. State*, 97 Ind. 555, 563, 564.

Besides the determination of motions to dismiss an action for want of prosecution is largely within the discretion of the trial court, whose action will not be reviewed by this court unless a clear case of abuse of that discretion is shown, which has not been done.

Judgment affirmed.

 THRASH ET AL. v. STARBUCK ET AL.

[No. 17,430. Filed June 19, 1896.]

APPELLATE PROCEDURE.—*Longhand Manuscript.*—*Bill of Exceptions.*—Under section 1476, Burns' R. S. 1894 (section 1410, R. S. 1881), the original longhand manuscript of the evidence must be filed with the clerk, before it is incorporated in the bill of exceptions.

SAME.—*Error in Rendition of Judgment.*—*New Trial.*—*Venire de Novo.*—Where, in an action to cancel a deed, the court of its own motion calls a jury and submits questions of fact, and upon the answers returned by the jury, renders judgment, the error, if any, is available by motion to strike out or modify the judgment, and not by motion for a new trial or *venire de novo*.

HARMLESS ERROR.—*Demurrer.*—Error in overruling a demurrer to a bad pleading is not available, where the facts alleged therein are found against the party pleading them.

PLEADING.—*Complaint in Action to Cancel Deed.*—In an action to cancel a deed, executed by a person of unsound mind, allegations of tender to the grantee of the consideration paid, of a demand for a deed of reconveyance, and of knowledge on the part of the grantee that his dealings were with one *non compos mentis*, are sufficient.

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SAME.—Complaint.—Tender.—Where a grantee procures a conveyance, with the knowledge that the grantor is a person of unsound mind, a tender of the purchase-price is not a necessary prerequisite to a suit to annul such conveyance.

From the Jay Circuit Court. *Affirmed.*

J. H. Williamson, E. McGuff, and R. H. Harford,
for appellants.

J. S. Engle, LaFollette & Adair, and W. G. Parry,
for appellees.

HACKNEY, J.—The appellees, the widow and heirs at law of Robert Starbuck, deceased, sued the appellants, George Thrash and his wife, to annul a deed of conveyance, executed by the said Robert to said George. The complaint was in two paragraphs, the first alleging the weakness of mind of Robert Starbuck, and that said Thrash, by false and fraudulent representations, and upon an inadequate consideration, obtained from said Starbuck the conveyance of an undivided interest in fee-simple in a certain tract of land in Jay county, a life-estate in which was held by one Malinda Finch. The second paragraph sought to avoid said deed because of the alleged unsoundness of mind of said Starbuck. In said paragraph it was alleged that said Starbuck was, on the 1st day of February, 1892, of unsound mind, and incapable of managing his estate, which fact was well known to said Thrash; that, on said 1st day of February, 1893, said Thrash fraudulently procured and induced said Starbuck to execute to him a deed of conveyance for said real estate for the inadequate consideration of \$150.00, the same then being of the value of \$800.00, which fact said Thrash well knew; that said Starbuck continued to be of unsound mind from the day of the execution of said deed until in November, 1892, when he died intestate; that in October, 1893, the ap-

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pellees tendered to the appellants \$150.00 and demanded a rescission of said deed, and at the same time presented a deed prepared for the signatures and acknowledgment of the appellants; that they refused to accept said tender, refused to rescind the deed, and refused to reconvey said lands. It was alleged, also, that the appellees were the widow and heirs at law of said Robert Starbuck, and entitled thereby to take the estate of said decedent under the laws of the State of Indiana; and they prayed a rescission of said deed, a reconveyance of said lands, and all other proper relief.

A demurrer to each paragraph of complaint was overruled, and issue was joined by answers and reply. The appellants demanded, as of right, a trial by jury, which demand, upon the objection of the appellees, was denied. The court, of its own motion, called a jury for the purpose of submitting questions of fact in issue and, upon a trial, the court directed a number of interrogatories to the jury, which, without a general verdict, were returned with the answers thereto. Thereupon the court made an entry that "the court, being fully advised in the premises, renders judgment on the interrogatories and answers thereto, heretofore returned by the jury. It is therefore considered, adjudged, and decreed by the court that the deed in the proceeding mentioned, * * * be and the same is hereby canceled and set aside," etc.

Following this entry the appellants filed their motion for a new trial for causes, among which was the following: "That the court erred in rendering judgment for the plaintiffs on the interrogatories and answers thereto heretofore returned by the jury." This motion was overruled and an exception reserved.

The sufficiency of each paragraph of complaint is attacked in this court, various rulings in the admission

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of evidence are questioned, the correctness of several instructions given by the court is denied, the rejection of instructions is claimed as error, and the action of the court in rendering judgment without expressly entering findings, by it made, upon which to predicate such judgment.

Questions arising upon the evidence and instructions are not available, because the evidence is not properly in the record. The bill of exceptions contains what purports to be the longhand manuscript of the shorthand notes of the evidence, but there was no such filing of this manuscript, as required by law. The transcript contains the statement that on August 21, 1894, within the time allowed, the appellants "filed in said cause, in the office of the clerk of said court, their bill of exceptions, containing their motion for a new trial, the overruling of said motion by the court, and the defendants' exceptions thereto, and the longhand manuscript of all the evidence in said cause," etc. There is no other evidence of the filing of said longhand manuscript, except that in his certificate to the transcript, the clerk states: "I further certify that on the 21st day of August, 1894, the official reporter, who took down the evidence in said cause, filed in my office his longhand manuscript thereof, and the defendants at the same time filed their bill of exceptions, which longhand manuscript was made a part thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions made a part of the foregoing transcript." It is manifest that the longhand manuscript of the evidence was not filed in the clerk's office before the bill of exceptions was filed, or before it was incorporated in the bill. This, it has been held, is not in compliance with the statute. Section 1476, R. S. 1894 (section 1410, R. S. 1881). *DeHart v. The Board, etc.*, 143 Ind. 363;

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Holt v. Rockhill, 143 Ind. 530; *Smith v. State*, ante, 176; *Indiana, etc., R. R. Co. v. Lynch*, ante, 1.

The question suggested by the motion for a new trial, as to the rendition of judgment upon the interrogatories to and answers thereto by the jury, it is urged by counsel for the appellees, presents no proper question for decision. The theory upon which the trial proceeded was that the cause was of equitable cognizance, and not triable by a jury. But, as it is conceded the court had the privilege of doing, a jury was called to hear issues of fact and return findings thereon for the information of the court. It is conceded, also, that under this practice the findings of the jury were not properly the basis of the court's judgment or decree, but that it was the duty of the court, if the findings of the jury coincided with the court's findings, or if the court concurred in the conclusions reached by the jury, to enter its findings, however induced, as its own, and upon such findings predicate its decree. We do not consider whether the action of the court should be held an adoption, as its own, of the findings of the jury, but the question arising before we reach that inquiry is, did the motion for a new trial invite such action from the lower court as will admit of the objections here urged? The rendition of judgment was not a part of the trial. Any error in that respect called for no new hearing upon the issues. The burden of another trial was not essential to the correction of the error, if it was an error. The only step taken by the appellant inviting a correction of the supposed error of the court was in moving for a new trial, the sustaining of which would have needlessly entailed another hearing upon the evidence. Nor do we think, as counsel for the appellees argue, that a motion for a *venire de novo* was the correct motion. That step likewise called for another presenta-

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tion of the evidence, and was, for the reasons already given, entirely unnecessary. The action of the court should have been invited by motion either to strike out the judgment or to modify the judgment, and a ruling on such motion would have afforded the court an opportunity to correct its error without declaring a mistrial, or to stand upon its action and permit an exception, which would supply the basis of error assigned in this court.

The remaining inquiries relate to the sufficiency of the paragraphs of complaint. Treating the judgment as predicated upon the findings disclosed by the answers to interrogatories, and this we must do because of the absence of any proper question of them, we are lead to conclude that the judgment was predicated upon the second paragraph of complaint and not upon the first paragraph. It was expressly found that the transaction on the part of Thrash was not fraudulent. The judgment, therefore, could only rest upon and must find its support from the second paragraph of complaint. Where a demurrer has been overruled to a bad pleading, and it appears that the facts alleged therein are found against the party pleading them, such rulings cannot become available error. *Miller v. McDonald*, 139 Ind. 465; *Miller v. Rapp*, 135 Ind. 614; *Evansville, etc., R. R. Co. v. Maddux*, 134 Ind. 571; *Louisville, etc., R. W. Co. v. Davis*, 94 Ind. 601; *McComas v. Haas*, 93 Ind. 276; *Johnson v. Ramsay*, 91 Ind. 189.

Besides the finding metioned, it was found that at the time of making said deed Robert Starbuck did not have sufficient mental capacity to understand ordinary business affairs and comprehend the nature of his acts; that the consideration paid was inadequate, and was but \$150.00, when the value of the interest conveyed was \$450.00; that said Robert, at said time,

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appeared to be of unsound mind and incapable of transacting business, and was actually of unsound mind. It was found, also, that before bringing this suit the appellees caused to be tendered to Thrash \$150.00 in gold coin, with a deed ready for signatures and acknowledgment, reconveying said real estate to the appellees, and that he refused to accept said money or to reconvey said lands. These findings supply the material facts alleged in the second paragraph of complaint. Was the second paragraph of complaint sufficient to withstand the demurrer of the appellants? One objection urged against it is, that no disaffirmance is alleged. The allegations of tender, demand for deed, and knowledge on the part of the grantee, that his dealings were with one *non compos mentis*, are, we have no doubt, sufficient.

The demanded rescission was a plain and emphatic declaration of an intention not to be bound by the deed. The objection, that this is insufficient, is upon the ground that the appellant could not know the reason for the avoidance. Knowledge of the incapacity of his grantor being alleged was a sufficient notice of the reason, if indeed a reason therefor were necessary. Ordinarily it is not required that reasons for one's acts shall be pleaded, or that the evidence of the fact shall be set forth in the pleading.

In *Drake v. Ramsay*, 5 Ohio, 252, it was held that "an effort to restore parties to their original condition, or any act unequivocally manifesting the intention, would render the avoidance effectual."

In *Long v. Williams*, 74 Ind. 115; *Scranton v. Stewart*, 52 Ind. 68, and *Law v. Long*, 41 Ind. 586, the rule was recognized that any act distinctly and emphatically declaring an intention to disaffirm is a disaffirmance.

In *Clark Contracts*, p. 253, it is said: "A deed may be effectually avoided by any acts or declarations dis-

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closing an unequivocal intent to repudiate it." *Haynes v. Bennett*, 53 Mich. 15; 18 N. W. Rep. 539.

It has been held, also, that disaffirmance arises from conduct clearly inconsistent with the contract. *Pyne v. Wood*, 145 Mass. 558; 14 N. E. Rep. 775; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Dallas v. Hollingsworth*, 3 Ind. 537.

It is further objected that the paragraph did not allege that the appellees made their tender of the purchase-money good by bringing it into court for appellants' use. It is the undoubted rule that where one deals fairly with a person of unsound, though apparently of sound mind, without knowledge of such unsoundness, is entitled to be placed in *statu quo* upon the avoidance of the deed or other contract resulting from such dealing. *Boyer v. Berryman*, 123 Ind. 451; *Fay v. Burditt*, 81 Ind. 433; *Copenrath v. Kienby*, 83 Ind. 18; *Musselman v. Cravens*, 47 Ind. 1.

It has not, to our knowledge, been decided in this or any other state that where the contract has been entered into with knowledge of the insanity, and an unconscionable advantage has been taken of the insane person, that it is a necessary prerequisite to avoidance, that a tender of that which has been received by such insane person shall be made. If the rule requiring the parties to be placed in *statu quo* includes, as a necessary element, the requirement that the party dealing with the *noncompos* shall be ignorant of the incapacity, and shall not deal unfairly, it would seem to follow as an indispensable result that the presence of such knowledge and of an unfair advantage would discharge the rule. Otherwise such elements of the rule are mere empty phrases.

Some cases go so far as to hold that one dealing with another who is insane, knowing of such insanity, unless such dealing is to supply necessities, cannot

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claim the contract to be merely voidable, but they hold it to be void. *Lincoln v. Buckmaster*, 32 Vt. 652; *Henry, Adm., v. Fine*, 23 Ark. 417; *Matthiessen, etc., Co. v. McMahon's Admr.*, 38 N. J. L. 536, and cases cited in each.

Though this rule may not prevail in Indiana, it discloses the bent of the judicial mind against permitting the shrewd and cunning man of affairs to deal with one whom he knows to be incapable of dealing with judgment and discretion, and, after taking an unfair advantage of the opportunity, incur no hazard whatever. If he may so deal, with the possibility of retaining that so illy gotten, and with no possibility of losing that with which he parted, he is not restrained from attempting the advantage as opportunity offers.

In *Gibson v. Soper*, 6 Gray, 279, it was held that "To say that an insane man, before he can avoid a voidable deed, must put the grantee in *statu quo*, would be to say, in effect, that, in a large majority of cases, his deed shall not be avoided at all. The more insane the grantor was when the deed was made, the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution. If he was so far demented as not to know or recollect what the bargain was, the difficulty will be still greater."

In *Eaton v. Eaton*, 37 N. J. L. 108, it was said of the above holding that "This is good law where there is fraud practiced upon one who is known at the time to be insane, but is not the law where the purchase and conveyance are made in good faith for a good consideration and without knowledge of the insanity." The case of *Crawford v. Scovell*, 94 Pa. St. 48, followed the case of *Gibson v. Soper*, *supra*.

In *Halley v. Troester*, 72 Mo. 73, it was held that one who receives property by exchange from another who

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is of unsound mind, and this fact may be known from ordinary observation, is not entitled, upon avoidance of the transfer, to have the exchanged property tendered back. See also 20 Am. L. Reg. (N. S.), p. 65.

Here, however, we are not required to go to the extreme limits of the cases cited. A tender was made and was refused, as we learn from the allegations of the complaint. This, we think, was unnecessary as a prerequisite to the suit, where it is alleged that the grantee took the conveyance with knowledge of the mental condition of the grantor, and obtained therein an unconscionable advantage. Whether the appellant might recover the purchase-money is not before us. However, it was found by the jury that the money tendered was taken into court for the use of the appellant, and we have no doubt the lower court, having the evidence before it, can determine the equitable rights of the parties in the premises.

Other objections to this paragraph are suggested, but they are of a trivial character, such as, that by the evident mistake in dates of deed, and death of Robert Starbuck, the conveyance was after his death. These objections are not considered.

Finding no error in the proceedings and judgment of the trial court, said judgment is affirmed.

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[No. 17,822. Filed May 26, 1896.]

CHATTEL MORTGAGE.—Collateral Security.—The maturity and extension of a principal note, before the maturity of a mortgage note held as collateral security for such principal note, do not require an extension of the mortgage to protect the extension of the prin-

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cipal note, under a statute requiring the extension of the mortgage within a specified time before the maturity of the debt.

APPEAL.—*Joint Assignment of Error.*—An exception to two separate findings, or conclusions of law, is not available if either conclusion is warranted by the facts.

HARMLESS ERROR.—*Counter-claim.*—To sustain a demurrer to a counter-claim is not available error, where the same facts have been set up and held good as an answer in bar.

From the Elkhart Circuit Court. *Affirmed.*

H. C. Dodge, and *Dodge & Hubbell*, for appellants.

State & Chamberlain, and *J. M. Vanfleet*, for appellee.

HACKNEY, J.—The appellee sued the appellants, the Clause Printing Press Company, John J. Clause, William L. Collins and William R. Thrasher, upon a note for \$7,500.00, executed by said Clause, payable to his own order and by him endorsed to the appellee, and upon a note for \$15,000.00, secured by a chattel mortgage of certain personal property, executed by Clause and delivered to the appellee as collateral security for the former note, said several obligations having been executed in Chicago, in the State of Illinois, and the property covered by said mortgage having been brought from said city to the city of Elkhart, in this State, after the execution of said several obligations. Various rulings were had upon demurrers to pleadings, and issues were formed upon an amended complaint, certain answers and cross-pleadings, and the court rendered a special finding of facts with conclusions of law in favor of the appellee, from which judgment followed for \$7,350.00 against said Clause, and a foreclosure of said mortgage as to all of the appellants.

The appellants, the Clause Printing Press Company, and Wilson L. Collins, only, present any question for

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decision by this court. The special finding was as follows:

"1st. That on or about the 30th day of March, 1889, the plaintiff and defendant, John J. Clause, entered into an arrangement by which plaintiff was to furnish money to said defendant to carry on its business in the following manner: Said Clause was to make his note to the plaintiff in the sum of \$15,000.00, secured by a chattel mortgage upon his stock and machinery, which was to be held by the plaintiff as collateral security for any advancements that might be made by the plaintiff, and for any indebtedness of said Clause that might thereafter accrue to the plaintiff. That for the purpose of obtaining such advancements, said Clause was to make his own notes from time to time to the bank and receive credit on the books of the bank for the amount of such notes, less two and one-half per cent. per month thereon, and said Clause was to check out the amount of such credit as needed, and was to pay his notes by deposits as his business would allow; that such collateral note and mortgage should be renewed from time to time so as to keep it at all times a good and valid security under the laws of Illinois.

"2d. That pursuant to such an arrangement the parties began and continued dealing from the 30th day of March, 1889, until the execution of the note for \$7,500.00 sued upon in the complaint, as hereinafter set forth. And the said defendant, to obtain such advancement, executed his several notes to the plaintiff for the several amounts, and payable at the several dates as set forth in the fourth answer of the said defendant Clause filed herein. And the several amounts of interest as stated in said answer were each severally deducted and reserved from such advancements severally at the time that credit for each of said notes was given in the books of the bank.

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"3d. That payments were made from time to time by said Clause to the plaintiff pursuant to such arrangement by his deposits of money in the bank, which was applied in payment upon said notes and as each note was fully paid it was surrendered up to said Clause, if not fully paid it was renewed, but the evidence does not show what payments were so made, nor the amount or time of making any such payments, nor the notes so renewed or surrendered and given up, nor the dates of any such surrender, payments, or renewals, except as hereinafter set forth.

"4th. That on the 23d day of March, 1892, the said Clause executed to the defendant, William R. Thrasher, his note for \$7,500.00, and as the consideration therefor, the said Thrasher executed and delivered to said Clause his check on the bank for \$7,350.00, \$150.00 being reserved out of said \$7,500.00 as interest at the rate of two per centum per month in advance. That at the time of the execution of said note, said Clause executed to said Thrasher the note and mortgage for \$15,000.00, a copy of which is filed with the complaint and marked 'exhibit B.' Such note and mortgage were at said time delivered to the defendant Thrasher as collateral security for the said \$7,500.00 note so given to him. Said Thrasher delivered the said \$15,000.00 collateral note and mortgage to the plaintiff's bank and retained possession of the principal note of \$7,500.00 for five months, and collected and received from said Clause as interest thereon each month thereafter in advance \$150.00, being at the rate of two per centum per month, and amounting in all to \$900.00. Thrasher in said transaction acted for the plaintiff and as its agent.

"5th. That on the 26th day of August, 1892, the defendant Clause executed, endorsed and delivered to the plaintiff the note for \$7,500.00, a copy of which is

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filed with the complaint marked 'exhibit A.' Such note was given in renewal of said \$7,500.00 note so given to said Thrasher as aforesaid, and at the time of the execution of said note to the plaintiff it was the understanding between said Clause and itself, that said note and mortgage for \$15,000.00 which Clause had executed to Thrasher as collateral security, should be thereafter held by the bank in the same manner; and said note of August 26, 1892, so executed to the plaintiff by said Clause, is past due and wholly unpaid, and amounts to \$8,900.00, principal and interest to this date.

"6th. That said mortgage for \$15,000.00 so executed by the said Clause to the said Thrasher as such collateral security at the time of its date, was fully executed, acknowledged, filed and recorded, according to the laws of Illinois, in the county of Cook, and State of Illinois, where all parties then resided, and the goods and property described in said mortgage were then owned by and in the possession of said Clause in said Cook county, and said mortgage then became and was, and is yet a valid and subsisting lien on such goods and property. That all said transactions heretofore stated occurred in the county of Cook, and State of Illinois. And said John J. Clause, resided in the town of South Chicago in said county, at the time said mortgages were executed.

"7th. That about the 30th day of October, 1892, with the knowledge and consent of the plaintiff, the said Clause removed the said goods and property described in said mortgage to the city of Elkhart, Indiana, and it was the understanding between said Clause and the plaintiff, that if Clause should succeed in procuring the organization of a corporation to take and use said property, and should procure the assignment to the plaintiff of fifty-five per cent. of the stock

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of such corporation, the plaintiff would release its said mortgage. That Clause procured the organization of such corporation and sold to it the goods and property described in its mortgage, but did not cause to be assigned to the plaintiff any of its stock, and such goods and property are now in the possession of the defendant, the Clause Printing Press Company, at Elkhart, Indiana, which is the same organization or corporation so procured to be organized by said Clause, and said defendant company executed to the defendant Collins a mortgage on said property as alleged in the complaint, but it is subsequent and inferior to the plaintiff's mortgage.

"8th. That before and at the time said Clause executed said note to Thrasher, and at the time of the execution of the \$7,500.00 note aforesaid, the law of Illinois was as follows: 'If any person or corporation in this State shall contract to receive a greater rate of interest or discount than seven per cent. upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled to recover only the principal sum due to such person or corporation,' as set forth in defendant's answers and cross-complaint.

"9th. That before the bringing of this action, the plaintiff felt and had just cause to feel insecure, and to fear a diminution of his security, and waste and loss of said property so described in its said mortgage.

"10th. That at the time of the execution of said mortgage, the law of Illinois on the subject of providing for the execution, acknowledgment, extension, filing, recording and renewing of chattel mortgages was, and at the time of trial is, as the same is correctly set out on pages 3, 4 and 5 of the amended complaint.

"11th. That at no time after the execution of and recording said chattel mortgage, did plaintiff or said

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Clause, themselves or either of them, or by their agent or attorney, file for record in the office of the Recorder of Deeds of Cook county, Illinois, and with H. R. Brayton, justice of the peace, or his successor, upon whose docket the said mortgage was entered, an affidavit setting forth particularly [or otherwise] the interest which the mortgagee had by virtue of said mortgage in the property therein mentioned, and such an affidavit was not made nor recorded by said recorder of said county, and the same was not entered upon the docket of said justice of the peace or his successor in office.

"12th. That at all times between the said first agreement and the close of their dealings, the said Clause was indebted to the bank in some amount, but the several balances of his amount on its book is not shown.

"Upon the above facts the court states conclusions of law as follows:

"1st. That the plaintiff is entitled to recover on its said note of \$7,500.00, the sum of \$7,350.00, and no more, and is entitled to judgment against the defendant, John J. Clause, for such amount.

"2d. That the plaintiff is entitled to foreclose its said chattel mortgage upon the goods and chattels therein described as against all of the defendants herein, and to have such property sold as upon execution to pay its said debt."

There was no exception to the conclusions of law by Collins, and the exception by the Clause Printing Press Company was to such conclusions jointly. The assignment of error upon the conclusions of law, as to Collins, of course, presents no question whatever, and that as to the company is as to the conclusions collectively, and if either is warranted upon the facts

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there is no available error upon such conclusions. *Saunders, Treas., v. Montgomery*, 143 Ind. 185.

The provisions of the chattel mortgage laws referred to in finding numbered ten are as follows:

"Section 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, that no mortgage, trust deed, or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with grantor, and the instrument is acknowledged and recorded as hereinafter directed, and every such instrument shall, for the purpose of this act, be deemed a chattel mortgage.

"Sec. 4. Such mortgage, trust deed, or other conveyance of personal property, acknowledged as provided in this act, shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded; or in case the mortgagor is not a resident of this State, then in the county where the property is situated and kept, and shall thereupon, if the mortgage is *bona fide*, be good and valid from the time it is filed for record, until the maturity of the entire debt, or obligation, or extension thereof, made as herein-after specified.

"Provided, Such time shall not exceed two years from the filing of the mortgage, unless within thirty days next preceding the expiration of such two years, or if the said debt or obligation matures within such two years, when within thirty days next preceding the maturity of such debt or obligation, the mortgagor and mortgagee, his or their agent or attorney,

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shall file for record, in the office of the Recorder of Deeds of the county where the original mortgage is recorded; also with the justice of the peace or his successor, upon whose docket the same was entered, an affidavit setting forth particularly the interest which the mortgagee has by virtue of said mortgage in the property therein mentioned, and if such mortgage is for the payment of money, the amount remaining unpaid thereon, and the time when the same will become due by extension or otherwise, which affidavit shall be recorded by said recorder, and be entered upon the docket of such justice of the peace, and thereupon the mortgage lien originally acquired shall be continued and extended for and during the term of two years from the filing of such affidavit, or until the maturity of the indebtedness or extension thereof secured by said mortgage: Provided, such time shall not exceed two years from the date of filing of such affidavit."

The first contention by counsel for the appellants is that under finding numbered eleven, in connection with the laws of Illinois, above set out, the mortgage in question lapsed and was void, because of the failure to file and record the affidavit of the extension of the debt, as required by the above quoted proviso. The \$15,000.00 note and mortgage were dated and executed March 23, 1892, and were payable one year thereafter; the \$7,500.00 note in suit was dated and executed August 26, 1892, was payable in thirty days therefrom, and was in renewal of another note, for \$7,350.00, dated and executed March 23, 1892. The contention of counsel upon the proposition mentioned rests upon the theory that the maturity of the principal debt, that evidenced by the note of March 23, 1892, for \$7,350.00, and the extension thereof by renewal, as evidenced by

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the note of August 26, 1892, required the mortgage to be extended as if the sum collaterally secured were the principal debt covered by the mortgage. Manifestly, we think, the statute of Illinois was designed to prevent long-time mortgages of personal property to be held as a cover to indefinite and unascertainable debts, and to require, if the mortgage debts were extended beyond two years, that the public records should disclose the new form and amount of the debt at the time of such extension. Here the mortgage and the primary obligation it secured were but for one year, and both of the transactions collaterally secured by them were executed and matured within the year during which the mortgage was to run. The proposition here under investigation does not suggest the invalidity, *ab initio*, of the mortgage, and just how the maturity and renewal of a collateral debt, or a debt collaterally secured, can operate to bring to maturity and extend the credit secured primarily by the mortgage, we do not comprehend. If the renewed obligation, so collaterally secured, had been paid the mortgage would have become released as a collateral security, it would have performed the collateral office, but it would not, therefore, have ceased to be a security for the \$15,000.00 note, the primary obligation, so far as the mortgage was concerned. If creditors of Clause could have been deceived by the mortgage it could only have been from its possible invalidity from having no consideration to support the \$15,000.00 note, and not because the renewal of the \$7,350.00 note had affected it. Authority is cited to the proposition that "Where a note is pledged as collateral security, under circumstances as to the original debt which fails to make the pledgee a holder for value, a renewal of the note is subject to

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the objection 'that it involves' a prolongation of the original contract." Colebrook Collateral Securities, section 14. Just what bearing this authority has with reference to the present transaction we do not discover. There is no intimation, in connection with the present inquiry, that the appellee was not a pledgee for value. The same section affirmatively recognizes the conclusion that where a debt collaterally secured is renewed the collaterals may be enforced for the payment of the debt so renewed. We think there is nothing in the appellants' contention upon this proposition.

Though apparently somewhat out of its order, we may suggest that the objection of the appellants to the action of the trial court in overruling his demurrer to the amended complaint, because the latter did not allege a continuation of the mortgage upon the renewal of the \$7,350.00 debt, must fail for the reasons just given with reference to the special finding, and we have only gone into the question as made upon the second conclusion of law, for the reason that it clearly presents the same question made upon the demurrer to the amended complaint.

It is next urged that the first conclusion of law is erroneous because of the usury laws of Illinois, which are set out in the eighth finding, and under which a contract for interest or discounts in excess of seven per cent. forfeits all interest and limits a recovery to the principal of the debt. The question urged arises under an answer by Clause, who as shown, raises no question as an appellant, and it rests upon the theory that the \$7,500.00 note in suit is the result of, and is infected with the vice of other usurious contracts, extending from March 30, 1889, down to August 26, 1892, something like one hundred transactions, which are alleged to have been pursuant to the understanding be-

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tween him and the appellee, as set out in the first finding; that the aggregate of usurious payments exceeds the appellee's demand; that the consideration for the note in suit was the balance of usurious charges, and that there was, therefore, no consideration, in a legal sense. We do not stop to inquire if the Printing Press Company can raise this question, since the special finding discloses affirmatively that the note in suit was a renewal of one executed to Thrasher upon "his check on the bank for \$7,350.00," and it is not found that any part of said note included any balance from said numerous transactions, or that any one or more of said transactions entered into it. While it is found that the numerous items of usurious interest and discounts, alleged in said answer, were paid and retained, it is found by the third finding that the evidence does not disclose the renewal of any obligation, except as set forth in succeeding findings, and in the succeeding findings the only renewal stated is that of the note for \$7,350.00. The burden of the issue as to usury was upon Clause, and where there is an absence of facts rendering necessary a different conclusion from that reached, the court will indulge presumptions against the party having the burden of proving such facts. It is unnecessary, in our view of the findings, that we should consider the legal question discussed by counsel as to the extent to which a partial usurious consideration will affect the note, nor that usurious payments will not be applied to the discharge of the interest, but will be applied to the cancellation of the principal. If it cannot be said that the transaction in question was made up in whole or in part of the transactions preceding it, and which included unlawful charges of interest and discounts, but if it may stand as an independent transaction, we do not under-

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stand the rule to be, nor do counsel contend, that the former transactions could so taint the present as to destroy the consideration therefor. It would certainly be a new rule of equity that would strike down a transaction, not in itself unlawful, because the parties to it had had dealings that were unlawful.

No other objection is made to the first conclusion of law, and having found that it was not objectionable, we are not required, as we have shown, to examine objections to the second conclusion, under the rule that a joint exception fails if any one of the conclusions objected to is proper.

The next assignment of error, in the order as presented by the argument, challenges the action of the trial court in sustaining the appellee's demurrer to the third paragraph of the answer of the Clause Printing Press Company and Collins. The appellee insists that this answer presents no question for consideration in this court; first, because the certificate to the transcript is to the special elements of the transcript without any general statement that these elements constitute all of the pleadings or all of the record; and second, because the sixth answer covered the material features of the third, namely: an agreement between Clause and the appellee that the mortgaged property might be removed to Indiana and sold by Clause to a corporation, to be formed for the purpose of owning and operating it, the purchase-price thereof to be in the stock of the corporation and that the lien of appellee should be relinquished and abandoned; in consideration of which Clause was to turn over to the appellee, as security for the debts in question, the stock issued to him. Appellants make no response to this contention, and, if we should indulge the usual presumptions in favor of the action of the trial court,

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taking the silence of the appellants as a concession of the appellee's propositions, we should hold that no question was presented, and that there were pleadings not in the record under which appellants had the benefit of the defense. However, the third and sixth answers differ only in a collateral matter, one alleging the want of knowledge of the mortgage, and the other a reliance upon said agreement between Clause and the appellee as to the removal and sale of the property. Either of these collateral facts depended upon the primary fact, viz.: the agreement. The special finding numbered seven discloses that a hearing was had as to said agreement, and that it was not to the effect that Clause might sell the property, but instead that if a corporation should take and use the property, and should procure the assignment to appellee of fifty-five per cent. of the stock of such corporation, the appellee would release the mortgage.

The hearing and finding disclosed are conclusive that appellants were not harmed by the ruling here complained of.

Appellants complain, also, of the ruling of the trial court in sustaining appellee's demurrer to their counter-claim. Counsel says: "That paragraph proceeds upon the theory that the consideration for the debt claimed to have been secured by the mortgage in suit had been fully paid, setting out in detail the manner in which it had been paid; that manner being, in substance, that the debt was founded upon usury, and that payments had been made sufficient of usurious interest, in a sum in excess of the principal, which payments should have been applied to the principal, and would have thus extinguished it." Counsel for appellee urge that the same facts were pleaded in bar of the action, in a paragraph of answer, to which the

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court overruled a demurrer, and that the appellants had the benefit of the facts upon the trial, and were therefore, not harmed by the ruling complained of. This proposition is not questioned by the appellants, and is confirmed by the facts specially found, as well as by an examination of the two pleadings. As we have seen, the same plea was interposed also by Clause, and upon the facts found, as we have held, was not available to diminish or defeat the note in suit.

Finding no available error in the record, the judgment of the circuit court is affirmed.

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ZAPF v. THE STATE.

[No. 17,772. Filed June 19, 1896.]

From the Marion Criminal Court. *Affirmed.*

Baker & Daniels, Elliott & Elliott, Stuart Bros. & Hammond, Zollars & Worden, Lamb & Beasley, and S. R. Hamill, for appellant.

W. A. Ketcham, Attorney-General, C. S. Wiltzie, F. E. Matson, E. F. Ritter, and Duncan, Smith & Hornbrook, for State.

JORDAN, J.—The appellant was convicted upon an indictment which charged that on the 4th day of July, 1895, he being duly licensed under the laws of this State to sell intoxicating liquors, did then and there unlawfully suffer and permit in his saloon certain persons named, who were not members of his family. This prosecution was based upon section 8 of an Act approved March 11, 1895, (Acts of 1895, p. 248).

The questions herein presented were considered and decided adversely to appellant in the case of *The State v. Gerhardt*, ante, 439, and upon the authority of that decision the judgment must be affirmed.

Judgment affirmed.

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[No. 17,798. Filed June 19, 1896.]

From the Warren Circuit Court. *Reversed.*

Stearns & Ringer, W. L. Rabourn, John Sutton, W. A. Ketcham, Attorney-General, C. E. Wiltsie, E. F. Ritter, F. E. Matson, and Duncan, Smith & Hornbrook, for appellants.

Lamb & Beasley, S. R. Hamill, Baker & Daniels, Stuart Bros. & Hammond, Zollars & Worden. and Elliott & Elliott, for appellee.

JORDAN, J.—The same questions are involved in this appeal as were in the case of *Wilson v. Mathis, ante*, 493, and upon the authority of the decision in that cause, the judgment of the lower court is reversed and the cause remanded.

MCCABE, J., took no part in this decision.

DINNIN v. THE STATE.

[No. 17,810. Filed June 19, 1896.]

From the Marion Criminal Court. *Affirmed.*

Baker & Daniels, Elliott & Elliott, Stuart Bros. & Hammond, Zollars & Worden, Lamb & Beasley, and S. R. Hamill, for appellant.

W. A. Ketcham, Attorney-General, Duncan, Smith & Hornbrook, E. F. Ritter, C. E. Wiltsie, and F. E. Matson, for State.

JORDAN, J.—Appellant was convicted in the lower court of operating a music box in his saloon in the city of Indianapolis, in violation of section 2 of an act of the General Assembly, approved March 11, 1895, (Acts of 1895, p. 248.) The questions involved in this appeal were considered and decided adversely to the contentions of appellant, in the case of *The State v. Gerhardt, ante*, 439, and upon the authority of that decision the judgment ought to be affirmed.

Judgment affirmed.

 Conwell v. Overmeyer.

BARTON ET AL. v. CRIDGE ET AL.

[No. 17,734. Filed June 19, 1896.]

From the Madison Circuit Court. *Reversed.**H. D. Thompson and J. W. Layne, for appellants.*

MCCABE, J.—The appellant sued the appellee to recover possession of real estate. The circuit court sustained a demurrer to the complaint for want of sufficient facts. The error assigned is upon that ruling.

The complaint is in the ordinary form in such actions except the description of the land. The description is as follows: "Ten acres off of the south end of the northeast quarter of section 35, in township 19 north, in range 7 east, except four acres off of the west side of said ten-acre tract heretofore conveyed to Cassana McGill."

The only reason assigned in argument in support of the action of the circuit court in sustaining the demurrer to the complaint is that the description of the land sought to be recovered was too uncertain and hence the complaint did not state facts sufficient. The exact question thus presented was decided adversely to appellee's contention in *Collins v. Dressler*, 133 Ind. 290.

Adhering to the ruling there made, we must hold that the description was sufficient and that the complaint was good.

The judgment is reversed with instructions to overrule the demurrer to the complaint.

CONWELL v. OVERMEYER.

[No. 17,803. Filed June 19, 1896.]

From the Cass Circuit Court. *Affirmed.**Magee & Funk, for appellant.*

C. C. Bishop, G. W. Walters, W. A. Ketcham, Attorney-General, E. F. Ritter, F. E. Matson, C. E. Wiltsie, and Duncan, Smith & Hornbrook, for appellees.

MONKS, J.—Appellant filed his petition at the September term, 1895, of the board of commissioners of Cass county for a license to sell intoxicating liquors in a less quantity than a quart at a time, etc., in the town of Galveston, Jackson township, in said county.

A remonstrance in writing signed by a majority of the legal voters of said township against granting said license to appellant was filed

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on Thursday, August 29, 1895, with the auditor of said county, under the provisions of section 9 of an act of the General Assembly, approved March 11, 1895 (Acts 1895, p. 248), commonly known as the Nicholson law. If said remonstrance had been filed on Friday, August 30, 1895, it would have been in time. *Flynn v. Taylor, ante*, 533.

During the September term of said board of commissioners, and before final action on appellant's application a number of the legal voters of said township who had signed said remonstrance, filed a petition with the board asking that their names be stricken from the remonstrance, and that they be allowed to withdraw their objections to a granting of a license to appellants.

It is admitted that said remonstrance is not signed by a majority of the voters of said township unless the signatures of those remonstrants who filed the petition to withdraw their names are counted.

Counsel for appellant contend that the said remonstrants had the right to withdraw from said remonstrance and dismiss the same as to themselves at any time before the action of the board.

This question was decided adversely to the contention of appellant's counsel in *State v. Gerhardt, ante*, 439.

The judgment is affirmed.

GRELLE ET AL. v. WRIGHT.

[No. 17,791. Filed June 19, 1896.]

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From the Fulton Circuit Court. *Reversed.*

Holman & Stephenson, W. A. Ketcham, Attorney-General, C. S. Wiltsie, F. E. Matson, E. F. Ritter, and Duncan, Smith & Hornbrook, for appellants.

Lamb & Beasley, S. R. Hamill, Baker & Daniels, Stuart Bros. & Hammond, Zollars & Worden, Elliott & Elliott, and Conner, Rowley & McMahan, for appellee.

JORDAN, J.—This was a proceeding by the appellee to obtain a license to sell intoxicating liquors, against the granting of which a remonstrance under the Act of 1895 was filed. (Acts of 1895, p. 248). The main question presented by this appeal is the right of remonstrators to withdraw their names after the three days' period has commenced to run. The trial court held that this right existed and permitted the remonstrators to exercise it. This appeal was considered and the question involved decided adversely to the contentions of the appellee herein in the case of *The State v. Gerhardt, ante*, 439. For the error of the trial court upon its ruling upon this point the judgment is reversed and the cause remanded.

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Clause Printing Press Co. v. Chicago Trust and Savings Bank, 682.

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Hoffman et al. v. Henderson, 613.

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An applicant for a liquor license has the burden upon him to prove that he is a fit person to be intrusted with a license, see **INTOXICATING LIQUORS**, 2; *Castle v. Bell et al.*, 8.

One who challenges the mental capacity of a donor has the burden of establishing the absence thereof, see **PRACTICE**, 4, 5, 6; *Tegarden et ux. v. Lewis, Admr.*, 98.

A holder of a tax deed is not required to support it with proof that the delinquent had no personal property at the time of the sale from which the tax might be collected, see **TAX TITLE**; *Richard et al. v. Carrie*, 49.

CHANGE OF VENUE—

1. *Application for.—Diligence in Discovering Grounds For.*—An applicant for a change of venue, is not required to show diligence in discovering the grounds of such application.

Wilson v. Johnson, 40.

2. *Failure to Assign as Cause for New Trial.—Waiver of Error.*—The failure to assign the ruling of the court in granting a change of venue, as a cause in a motion for a new trial, is a waiver of any error in such ruling.

Ib.

3. *Perjury.—Discretion of Court.*—Where, in a prosecution for perjury, the defendant applies for a change of venue from the county, under section 1840, Burns' R. S. 1894, whether it shall be granted or not, is a matter that rests in the sound discretion of the court; and the exercise of that discretion will not be reviewed unless it has been clearly abused.

Smith v. State, 176.

CHATTEL MORTGAGE—

1. *Sale of Mortgaged Property.*—Where a chattel mortgage is executed covering a stock of goods, furniture and fixtures, without the privilege of selling, an action cannot be maintained to declare the mortgage satisfied, on the ground that the mortgagor had remained in possession and sold goods, the net proceeds of which exceeded the amount of the mortgage, where it is not shown that the goods were the goods mortgaged.

Banner Cigar Co. et. al. v. Kamm & Schilling Brewing Co. et al., 266.

2. *Fraudulent Consideration.*—Where a chattel mortgage is executed to secure the claim of several creditors, an honest creditor does not lose his security because the mortgage constituting the security embraces the separate claim of a party who participated with the mortgagor in perpetrating a fraud, where such claims were distinct and divisible.

Morgan et al. v. Worden et al., 600.

3. *Collateral Security.*—The maturity and extension of a principal note, before the maturity of a mortgage note held as collateral security for such principal note, do not require an extension of the mortgage to protect the extension of the principal note, under a statute requiring the extension of the mortgage within a specified time before the maturity of the debt.

Clause Printing Press Co. et al. v. Chicago Trust and Savings Bank, 632.

CHURCHES—See **RELIGIOUS SOCIETIES**, 2; *Smith et al. v. Pedigo et al.*, 361.

CIRCUMSTANTIAL EVIDENCE—Strength of to warrant a conviction, see INSTRUCTIONS TO JURY, 4; *Wantland v. State*, 38.

CITIES—

Annexation of Territory.—Corporate Boundaries.—Statute Construed.—Indianapolis Charter.—Sections 87 and 88, Act of 1891 (Acts of 1891, p. 137; sections 3808, 3809, Burns' R. S. 1894), providing for the annexation of territory by the common council, and granting the right of appeal to the resident freeholders only, is not a grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, do not equally belong to all citizens, and not in conflict with section 28, of article 1, of the State Constitution, nor with the clause in the fourteenth amendment to the Constitution of the United States, which provides, that: "nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Taggart, Aud., et al. v. Claypool, 590.

CITY TREASURER—Tenure of office when appointed by city council to fill a vacancy, see OFFICERS, 1; *Carson v. State, ex rel.*, 348.

COLLATERAL ATTACK—See COSTS; *Mott et al. v. State, ex rel.*, 353.

When judgment for divorce will be secure against, see DIVORCE, 1; *Hilbish v. Hattle*, 59.

When the order of allotment of a public ditch is not subject to, see DRAINAGE, 2; *Zimmerman, Treas., v. Savage*, 124; PLEADING, 3; *Duncan v. Lankford, Treas.*, 145.

COLLATERAL SECURITY—Extension of note held as, secured by chattel mortgage, see CHATTEL MORTGAGE, 8; *Clause Printing Press Co. et al. v. Chicago Trust and Savings Bank*, 682.

COLLUSION—Of parties to a suit; see *Fesler, Clerk, et al. v. Brayton*, 71.

COMMON COUNT—Recovery on when evidence discloses special contract, see PLEADING, 4; *Jenney Electric Co. v. Branham*, 314.

COMPLAINT—See PLEADING.

In an action to obtain a new trial the pleadings and evidence in the original case must be set out in the body of the complaint, see NEW TRIAL, 1; *Davis v. Davis et al.*, 4.

Necessary allegations of in an action for a new trial on the ground of newly-discovered evidence, see NEW TRIAL, 2. *Ib.*

Necessary allegations as to loss of deposition of a witness used in original trial, in an action for a new trial by reason of newly-discovered evidence, see NEW TRIAL, 3. *Ib.*

Sufficiency of in an action to set aside a conveyance as fraudulent, see APPELLATE PROCEDURE, 29; *Hoffman et al. v. Henderson*, 613.

CONSIDERATION—See CHATTEL MORTGAGE, 2; *Morgan et al. v. Worden, et al.*, 600.

A conveyance will not be protected although a full consideration was paid, where grantor and grantee unite in a fraudulent design to defraud the creditors of the former, see **FRAUDULENT CONVEYANCE**, 3; *Hoffman et al. v. Henderson*, 613.

CONSOLIDATION OF ACTIONS—See **APPELLATE PROCEDURE**, 26; *Roach v. Baker et al.*, 330.

CONSTITUTIONAL AMENDMENTS—Repeals inconsistent legislative acts; see *Fesler, Clerk, et al. v. Brayton*, 71.

CONSTITUTIONAL LAW—See **INTOXICATING LIQUORS**, 9, 10, 18; *State v. Gerhardt*, 439.

1. *Amendment of Constitution Repeals Inconsistent Legislative Acts.—Repeal by Implication.*—A constitutional amendment inconsistent with previous legislative enactments operates to repeal such enactments. *Fesler, Clerk, et al. v. Brayton*, 71.
2. *Unconstitutional Apportionment Act.—Repealing Clause.*—Where it appears from the repealing clause of an apportionment act, that it was only intended to repeal the former apportionment upon the supposition that the new one was to take the place of the former, the former act will not thereby be repealed, if the new act is unconstitutional. *Ib.*
3. *Apportionment Act.—Public Policy.*—Where there is but one act apportioning the State for legislative purposes that has not been repealed, an action will not lie to invoke the powers of the court to declare it unconstitutional. *Ib.*
4. *Special Acts.—Courts of Inferior Jurisdiction.*—The constitution does not prohibit special acts creating courts of inferior jurisdiction. *Stevens v. Anderson*, 304.
5. *When a Party May Question the Validity of a Law.*—A party will not be heard by a court to question the validity of a law, or any part thereof, unless he shows that some right of his is impaired or prejudiced thereby. *p. 450. State v. Gerhardt*, 439.
6. *Unjust or Oppressive Statute.*—A court cannot declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of a citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed, or protected by the constitution. *p. 450. Ib.*
7. *Statute.—Presumption in Favor of Validity.*—All presumptions must be indulged in favor of a statute, and it is only when made to appear clearly and plainly that a statute violates some provision of the constitution, that it should be declared void. *p. 451. Ib.*
8. *Invalidity of One Section May Not Invalidate Entire Act.*—When the different sections of an act are independent of each other, the invalidity of some of the sections would not necessarily invalidate the entire act. *p. 452. Ib.*
9. *Statute.—Amendment by Implication.*—Where an act does not, either by its title or its terms, expressly profess to be amendatory of any statute, but has a bearing on a prior statute, which may result in amending such prior statute by implication, it is not in violation of Art. 4, section 21, of the constitution prohibiting amendments to statutes by mere reference to title. *p. 452. Ib.*
10. *Continued Practice of Legislature.—Interpretation of Constitution.*—The continued and repeated practice of the legislature,

unquestioned for a period of forty years, becomes a potent factor in the interpretation of the constitution; so much so that the court will be controlled by it when in doubt. *p. 457.* *Ib.*

11. *Constitution.—Subject-matter and Title of Act.*—In Art. 4, section 19, of the constitution, providing that "every act shall embrace but one subject, and matters properly connected therewith," the word "subject" indicates the thing about which the legislation is had, and the word "matters" the things which are secondary, subordinate, or incidental. *p. 458.* *Ib.*

12. *Statutes Relating to Same Subject-matter Construed Together.*—When a number of statutes, no matter when passed, relate to the same thing, or a general subject-matter, they are to be construed together and are *in pari materia*. *p. 460.* *Ib.*

13. *Construction of Statute.*—Whenever a statute can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, such construction will be adopted by the courts. *p. 461.* *Ib.*

CONSTRUCTIVE NOTICE—How property rights of non-resident defendants are affected in divorce proceedings under, see *DIVORCE*, 2; *Hilbish v Hattle*, 59.

CONTINGENT DEVISE—See *WILLS*, 10; *Antioch College, etc., v. Branson et ux.*, 312.

CONTRACT—See *VENDOR AND PURCHASER*, 1; *Smith et al. v. Mills et al.*, 334.

Assignment of, see *CORPORATION*, 3; *Blue v. Capital National Bank*, 518.

A girl under the age of sixteen is incapable of entering into a marriage contract, see *MARRIAGE*, 2; *Henneger v. Lomas*, 287.

As to the mental capacity of parties necessary to support an ordinary contract, see *Teegarden et ux. v. Lewis, Admr.*, 98.

1. *Indefiniteness Of.*—A contract not to engage in a certain business within a prescribed territory "so long as plaintiff remained in said business in said city," is not invalid because the restraint is indefinite as to time. *O'Neal v. Hines*, 32.

2. *Statute of Frauds.*—An agreement not to engage in a rival business in a certain locality, so long as the other party remains in such business, is not within the statute of frauds. *Ib.*

3. *Restraint of Trade.—Construction of.*—In the sale by one partner of his interest in the partnership business to the other partner, an agreement on the part of the former not to engage in a rival business in the locality, so long as the other remains in such business, as part of the consideration of the sale, is not invalid as unreasonable. *Ib.*

4. *Injunction Restraining Breach Of.*—When one has made a valid contract with another that he will not engage in a certain business or occupation, and it is shown by the other party to the contract that the same is being violated to his injury, he is entitled to an injunction restraining the offending party, notwithstanding the offending party was at the time solvent. *Ib.*

CONTRIBUTORY NEGLIGENCE—Of railroad brakeman, see *MASTER AND SERVANT*, 1, 2; *Pennsylvania Co. v. Finney, Admr.*, 551.

CONVEYANCE—See *DEED*, 1, 2; *FRAUDULENT CONVEYANCE*.

CORPORATE BOUNDARIES—See *CITIES*; *Taggart, Aud., et al. v. Claypool*, 590.

CORPORATION—

1. *Salary of Vice-President*.—A vice-president of a banking corporation is not entitled to any compensation for performing the ordinary duties of his office in the absence of a governing statute, by law, regulation, or contract, providing therefor.
Blue v. Capital National Bank, 518.
2. *Breach of Contract*.—*Amount of Recovery*.—The breach of a contract by a bank to loan a party money at a specified rate of interest, does not entitle him to the difference between the interest on the amount borrowed at a stipulated rate, and that which he actually paid, unless he was unable to obtain money at the former rate from any other source. *Ib.*
3. *Assignment of Contract*.—The assignment of the interest of one of the parties in a preliminary contract between some of the incorporators of a bank, whereby they were to hold certain offices in the corporation at specified salaries, does not pass the claim of the assignor against the bank for the salary voted to him by the bank. *Ib.*
4. *Counter-claim*.—*Slander Cannot be Made the Subject of, Against a Promissory Note*.—Slander, upon the credit of maker, cannot be made the subject of a counter-claim in an action upon a promissory note for borrowed money. *Ib.*

COSTS—

1. *Judgment For*.—One recovering a judgment for costs is entitled to recover only the costs for which he is liable.
Mott et al. v. State, ex rel., 353.
2. *Improper Taxation Of*.—*Judgment For*.—*Collateral Attack*.—A judgment for costs by a court, having jurisdiction, is not void on the ground that it is excessive, or that items entering into it should have been omitted; and, therefore, is not subject to collateral attack. *Ib.*

COUNTER-CLAIM—Slander cannot be made the subject of against a promissory note, see *CORPORATION*, 4; *Blue v. Capital National Bank*, 518.

It is not available error to sustain a demurrer to a counter-claim where the same facts have been pleaded and held good in an answer in bar, see *HARMLESS ERROR*, 2; *Clause Printing Press Co. v. Chicago Trust and Savings Bank*, 682.

Admissibility of under general denial, in an action to foreclose a mortgage, see *PRACTICE*, 9; *Tron et al. v. Yohn, Admr.*, 272.

COUNTY COMMISSIONERS—

1. *Court*.—*Term*.—*Session*.—*Statutes Construed*.—Terms of commissioners' court, as are provided by section 7821, Burns' R. S. 1894 (section 5736, R. S. 1881), imply periods of prescribed duration; while a special "session" of such court as provided by sections 5917, 7822, Burns' R. S. 1894, implies a period of such duration as might be found necessary to the accomplishment of the objects in view.
Heim v. State, ex rel. Brammer, 605.
2. *Special Session*.—*Appointment of Township Trustee*.—At the special August session of the board of county commissioners for the

purpose of receiving the reports of township trustees as provided by section 5917, R. S. 1894, such board has no authority to fill a vacancy in the office of township trustee. *Id.*

COUNTY SURVEYOR—When will be presumed to have made proper notices of allotments, see DRAINAGE, 1; *Zimmerman, Treas., v. Savage, 124.*

COUNTY TREASURER—May deduct delinquent taxes against the payee of a county order, see DELINQUENT TAXES; *State, ex rel. v. Miller, Treas., 598.*

Cannot maintain an action for the recovery of county funds loaned by him, see OFFICERS, 4; *Winchester Electric Light Co. v. Veal, 506.*

COURTS—Special acts creating courts of inferior jurisdiction not prohibited by the constitution, see CONSTITUTIONAL LAW, 4; *Stevens v. Anderson, 304.*

CRIMINAL LAW—Affidavits for new trial can be brought into record only by bill of exceptions, see APPELLATE PROCEDURE, 30, 31; *Graybeal v. State, 623.*

1. *Assault and Battery with Intent.—Evidence.—Previous Good Character.—Mitigation of Punishment.*—In a prosecution for assault and battery with intent to kill, where the facts proved, clearly show an attempt to kill, evidence of previous good character will not avail to negative the intent, but may avail in mitigating the punishment. *Voght v. State, 12.*

2. *Perjury.—Affidavit and Information.—Repugnancy.*—When on affidavit and information a person is prosecuted for perjury, the affidavit charging the perjury to have been at the trial of a cause on the 26th of September, 1893, and the information alleges that the cause, at the trial of which the perjury was committed, was pending in the circuit court on the 26th of September, 1889, and that the perjury was committed on the 26th of September, 1893, a motion to quash, on the ground of repugnancy between the affidavit and information, and on the ground of repugnancy in the allegations of the information, is properly overruled. *Smith v. State, 176.*

3. *Indictment for Murder.—Surplusage.—Statute Construed.*—Where an indictment for murder in the charging part thereof alleged that "Ranph D. did unlawfully," etc., "kill and murder," etc., and an additional averment charged that the murder was committed with a revolver which "he, the said Ralph D., held in his hand," such second charge is mere surplusage and may be rejected under section 1756, R. S. 1881 (section 1825, Burns' R. S. 1894). *Drake v. State, 210.*

CRIMINAL PROCEDURE—Discharge of juror after submission of cause, see PRACTICE, 7; *Kurtz v. State, 119.*

1. *Assault and Battery with Intent to Kill.—Affidavit and Information.*—A charge of shooting and also of wounding, alleged to have been done unlawfully, feloniously, and purposely, and with premeditated malice, is sufficient to charge present ability on the part of the accused, to carry his felonious intent into effect. *Voght v. State, 12.*

2. *Murder.—Indictment.—Sufficiency Of.*—An indictment for murder need not charge that the killing was done unlawfully, feloniously, purposely and with premeditated malice but will be

sufficient if it charges that the acts which finally resulted in death were done unlawfully, feloniously, purposely and with premeditated malice. *Drake v. State*, 210.

8. *Affidavit and Information.—Sufficiency of Under Motion in Arrest of Judgment.*—An affidavit and information for an assault with intent to commit the crime of larceny, which does not allege that defendant attempted to perpetrate a violent injury, or that he had the ability to commit the injury is sufficient to withstand a motion in arrest of judgment. *Woodworth v. State*, 276

DAMAGES—When excessive damages cause for new trial, see **NEW TRIAL**, 4; *Marvin et al. v. Sager*, 261.

Against vendor of real estate for partial failure of title of one of several grantors, see **VENDOR AND PURCHASER**, 3; *Johnson et al. v. Williams*, 645.

DEDICATION—Unauthorized taxation of lands will not estop a municipal corporation from asserting the dedication thereof, see **ESTOPPEL**; *Rhodes v. Town of Brightwood*, 21.

1. *Park.—Municipal Corporation.*—An irrevocable dedication of land is effected by designating certain land on a map filed in the county recorder's office as a park, and by selling lots with reference to the map. *Ib.*
2. *Parol Evidence.*—Where a dedication of a tract of land is express, evidenced by a recorded plat, the intent, as expressed by such plat, cannot be contradicted by parol evidence. *Ib.*
3. *Irrevocable After Private Rights have Accrued.*—A dedication of land to public use is not revocable after private rights have accrued by reason thereof. *Ib.*
4. *Municipal Corporation Trustee for Public.—Change of Trustees.*—Where there has been laid out and filed a plat of land as an addition to a city, upon which plat a portion of the land is designated as a park, and there has been a sale of lots in reference to the plat, the dedication of the park thus effected is to the public, and may be asserted by a town subsequently incorporated, which annexes such addition to its corporate limits, for a change of trustees does not defeat the dedication. *Ib.*

DEED—

1. *No Description Contained In.*—Deeds purporting to convey lands, but containing no description or designation of the lands, are invalid for uncertainty, and are not admissible in evidence in an action to establish title to real estate. *Wilson v. Johnson*, 40.
2. *Insufficient Description.*—A deed of all "the remaining assets," of a designated person, "as the same were granted and conveyed to the grantors herein," is insufficient to convey lands not otherwise described therein. *Ib.*

DELINQUENT TAXES—

Deduction of from County Order.—Delinquent taxes against the payee of a county order may be deducted by the county treasurer from an order presented for payment where such order, issued and accepted by the payee, contained the provision that the same was allowed subject to all delinquent taxes owing by payee.

State, ex rel. v. Miller, Treas., 538.

DEMURRER—When the informality of a demurrer cannot be attacked, see **PRACTICE**, 11; *Blue v. Capital National Bank*, 518.

When overruling a demurrer to a bad pleading is not available error, see HARMLESS ERROR, 1; *Thrash et al. v. Starbuck et al.*, 673.

DEPOSITIONS—When may be taken during progress of trial, see PRACTICE, 10; *Humbarger v. Carey*, 324.

DEVISE—See WILLS. When a devise of real estate carries but a life-estate, see WILLS, 1; *Korf v. Gerichs et al.*, 134.

DEVEISEE—Charged with payment of money in respect to the estate given him, effect of, see WILLS, 3. *Ib.*

DISCRETION OF COURT—Determination of motions to dismiss an action for want of prosecution, when will not be reviewed by Supreme Court, see DISMISSAL OF ACTION, 2; *Cabinet Makers' Union v. City of Indianapolis*, 671.

DISMISSAL OF ACTION—By court for insufficiency of complaint on motion in arrest of judgment, when erroneous, see PRACTICE, 2; *Bucklen v. Cushman*, 51.

1. *Affidavits*.—Where a motion to dismiss a cause of action is sustained by the trial court, and the affidavits in support of such motion and the counter-affidavits were conflicting, under the long and well settled rule, this court cannot weigh the evidence and determine where the preponderance is, but must affirm the judgment of the trial court. *Cabinet Makers' Union v. City of Indianapolis*, 671.

2. *Discretion of Court*.—The determination of motions to dismiss an action for want of prosecution is largely within the discretion of the trial court, whose action will not be reviewed by this court unless a clear case of abuse of discretion is shown. *Ib.*

DIVORCE—Effect of as to interest of divorced wife in real estate conveyed by the husband during marriage in which she did not join, see HUSBAND AND WIFE, 1; *Fletcher v. Monroe et al.*, 56.

Effect of on wife's property rights when granted on account of the misconduct of the husband, see HUSBAND AND WIFE, 3. *Ib.*

Effect of on property rights of parties growing out of the marital relations, see HUSBAND AND WIFE, 2. *Ib.*

1. *Non-resident Defendant*.—*Collateral Attack*.—Where notice is given to a non-resident defendant in a divorce proceeding, as is provided by the statutes of the state in which such proceedings are had, the judgment of divorce will be secure against collateral attack. *Hilbish v. Hattle*, 59.

2. *Constructive Notice*.—*Effect of Divorce on Property Rights of Non-resident Defendant*.—*Statutes Construed*.—Where the husband obtains a divorce from his wife by constructive notice, the wife being a non-resident of the state in which the divorce proceedings were had, such divorced wife could not, under the statutes of this State, section 2660, Burns' R. S. 1894 (section 2499, R. S. 1881), and sections 1060, 1061, Burns' R. S. 1894 (sections 1048, 1049, R. S. 1881), have any rights in his property by virtue of any marriage relations with him, although said court did not, in such divorce proceedings, adjudicate the property rights of the parties. *Ib.*

3. *Post-nuptial Contract*.—*Effect of on Inchoate Interest of Wife*.—Where a post-nuptial agreement is made by a husband and wife in division of property, prior to a separation and divorce, in all respects fair and adequate in proportion to the property of each,

and the portion of the property therein given to the wife was received by her in full of all demands against her husband, and in full of her inchoate rights or contingent rights in his property as his wife or his widow, such contract will be upheld, and will bar a recovery by the divorced wife of any interest in the estate of the husband at his death, by virtue of the former marital relations. *Ib.*

DOCUMENTARY EVIDENCE—How made part of the record, see APPELLATE PROCEDURE, 12, 18; *Seston et al. v. Tether et al.*, 251.

DOWER—How affected by divorce, see HUSBAND AND WIFE, 1; *Fletcher v. Monroe et al.*, 56.

DRAINAGE—See JUDGMENT, 1; *Zimmerman, Treas., v. Savage*, 124.

1. *Cleaning and Repairing Ditch.—Notice of Allotment.—County Surveyor.*—In an action to enjoin the county treasurer from collecting the expenses of cleaning out and repairing an allotment of a public ditch, it will be presumed that the county surveyor gave the proper notices of allotments, as required by section 5634, Burns' R. S. 1894. *Ib.*

2. *Cleaning and Repairing Ditch.—Allotment.—Collateral Attack.*—The order of allotment of a public ditch, by the county surveyor, for the purpose of cleaning and repairing, made upon proper notice, is not subject to collateral attack, on the ground that a majority of the persons assessed did not petition for a reapportionment, as an appeal to the circuit or superior court is the exclusive remedy. *Ib.*

3. *Cleaning and Repairing Ditch.—Void Allotment.—Township Trustee.*—A landowner is liable for the expense incurred by a township trustee in cleaning the portion of a public ditch allotted to him by the county surveyor, to the extent that such allotment includes the original allotment for construction, even though the surveyor's allotment is void. *Ib.*

4. *Petition.—Statute Construed.*—Under sections 5622-5630, Burns' R. S. 1894, a petition to straighten, deepen, and tile an old open drain, does not have to be signed by a majority of the resident landowners. *Poundstone et al. v. Baldwin*, 139

5. *Eminent Domain.*—The taking of private property, authorized by the drainage laws of this State, is for a public and not a private use. *Ib.*

6. *Assessment of Benefits and Damages.*—Where the assessment of benefits in favor of a landowner for the repair of a drain exceeds the assessment of damages, he cannot require the payment of damages assessed before the work is established. *Ib.*

7. *Public Utility.—Police Power.*—The reclamation of wet lands, and the drainage of ponds and marshes is of public utility, and is for the benefit of the public health and welfare; and it is by virtue of the police power that the authority of the State is exercised to enact drainage laws.

Gifford Drainage District et al. v. Shroer et al., 572.

8. *Public Utility.*—The legislature has no power to enact a law authorizing one person to improve his own, or the lands of another, by drainage or otherwise, and compel the other persons benefited to pay therefor, unless the public is also benefited. *Ib.*

9. *District Drainage Act.—Constitutional Law.*—Section 22, of the District Drainage Act of 1893, section 5739, Burns' R. S. 1894, which authorizes the formation of a drainage district, upon the signing of an agreement by two-thirds or more in number of the owners of land, owning in acreage two-thirds or more of the land

in the proposed district, but which does not require that the proposed drainage shall benefit the public health, or otherwise be of public utility, and does not even require that the lands within the proposed district shall be swamp or wet lands, is unconstitutional and void. *Ib.*

ECCELESIASTICAL LAW—The Supreme Court has no ecclesiastical jurisdiction, and will not decide questions of ecclesiastical law except where property rights depend thereon, see **RELIGIOUS SOCIETIES**, 4; *Smith et al. v. Pedigo et al.*, 361.

EJECTMENT—

The Burden Rests Upon Plaintiff to Show Title in Himself.—A plaintiff in ejectment must recover on the strength of his own title, and if he fails to show title in himself it makes no difference whether the defendant had title or not. *Wilson v. Johnson*, 40.

ELECTION BY WIDOW—When acts and declarations will be held to amount to an election to take under the will and not under the law, see **WILLS**, 13; *Wilson et ux. v. Wilson et al.*, 659.

EMBEZZLEMENT—Of county funds by deputy county treasurer, see **INDICTMENT**, 1, 2; *Armstrong v. State*, 609.

EMINENT DOMAIN—Taking of private property under drainage law, see **DRAINAGE**, 5; *Poundstone et al. v. Baldwin*, 139.

EQUITY—When will not enforce an executory parol trust, see **WILLS**, 9; *Orth et al. v. Orth et al.*, 184.

ESTATES BY ENTIRETIES—

Husband and Wife.—*School Fund Mortgage.*—*Estoppel.*—Where a husband and wife, holding real estate by entireties, make application, in accordance with the statute, to the county auditor, for, and procure a school fund loan, mortgage such real estate to secure the same, and the money thus procured, with the knowledge and consent of the wife, is used in paying the individual debts of the husband, the wife is estopped from denying the validity of the mortgage. *Trimble et al. v. State, ex rel.*, 154.

EVIDENCE—See **CIRCUMSTANTIAL EVIDENCE**; **OPINION EVIDENCE**.

Plaintiff may recover on common count notwithstanding the evidence discloses a special contract, see **PLEADING**, 5; *Jenney Electric Co. v. Branham*, 314.

Action for new trial on the ground of newly-discovered evidence, see **NEW TRIAL**, 1; *Davis v. Davis et al.*, 4.

In an action to set aside a conveyance as fraudulent, see **FRAUDULENT CONVEYANCE**, 4; *Hoffman et al. v. Henderson*, 613.

The ruling of the court in excluding certain evidence must be verified by bill of exceptions where error is predicated thereon, see **APPELLATE PROCEDURE**, 8; *Roose v. Roose et al.*, 162.

When the admission of incompetent evidence is not reversible error, see **TRIAL**, 6; *Pigg v. State*, 560.

Weight of evidence is for the trial court, see **APPELLATE PROCEDURE**, 20; *Banner Cigar Co. et al. v. Kamm & Schillinger Brewing Co. et al.*, 266.

1. *Admissibility of in an Action for Quantum Meruit.*—In an action on the *quantum meruit* in a suit for value of services in effecting a sale of electrical machinery it was not error to permit the plaintiff to testify that defendant's president stated to him that the company paid from ten to fifteen per cent. commission for that kind of work.
Jenney Electric Co. v. Branham, 314.
 2. *Expert Witness.—Qualification Of.—Practice.—Discretion of Court.*—The question as to the qualification of a witness to testify as an expert is for the trial court, in the exercise of a sound discretion, and that when there is some evidence of such qualification and the trial court has not abused that discretion, this court will not review the action.
Ib.
 3. *Opinion Evidence.—Expert Testimony.*—Non-experts, who are shown to be familiar with the extent and character of the particular services rendered, may properly give their opinion of the value of that service.
Ib.
 4. *Judicial Notice.—Historical Facts.*—The court may take judicial notice of historical facts. *p. 412. Smith et al. v. Pedigo et al., 361.*
 5. *Articles of Faith Cannot be Contradicted by Parol.*—The articles of faith of a church being a solemn written compact, are conclusive on the question of faith, and cannot be contradicted by parol evidence.
Ib.
 6. *Prima Facie Case.—Practice.*—A *prima facie* case, made by plaintiff, must always stand unless its force is broken by the defendant's evidence; but the defendant is never required, under the general denial, to negative the truth of the plaintiff's *prima facie* case by a preponderance of the evidence.
Young et al. v. Miller et al., 652.
- ESTOPPEL**—See **ESTATES BY ENTIRETIES**; *Trimble et al. v. State, ex rel., 154.*
- Where the wife of a testator elects to take under the will she is estopped from asserting title to the real estate under the law as widow of her deceased husband, see **WILLS, 14**; *Wilson et ux. v. Wilson et al., 659.*
- Dedication.—Unauthorized Taxation.—Municipal Corporation.*—A municipal corporation is not estopped to assert a dedication of land, by the unauthorized taxation thereof to the original owner, after dedication.
Rhodes v. Town of Brightwood, 21.
- EXCEPTIONS**—Failure to save exceptions to ruling of court, see **APPELLATE PROCEDURE, 32**; *Hedrick et al. v. Whitehorn et al., 642.*
- EXECUTORS AND ADMINISTRATORS**—
- Authority to Mortgage Estate to Pay Debts.—Petition to Sell.*—Where an administrator has petitioned for an order to sell real estate to pay debts of an estate, an order directing such administrator to mortgage such real estate is invalid. *Edwards v. Baker et al., 281.*
- EXPERT WITNESS**—See **OPINION EVIDENCE.**
- Qualification of, in discretion of trial court, see **EVIDENCE, 2**; *Jenney Electric Co. v. Branham, 314.*
- FEES**—Payment of the fee is a condition precedent to the receiving and filing articles of agreement by the Secretary of State, see **RAILROADS**; *State v. Chicago, etc., R. R. Co. et al., 229.*
- FIDUCIARY**—One occupying a fiduciary relation must establish his right to any advantage gained by him by reason thereof, see **PRACTICE, 5**; *Teegarden et ux. v. Lewis, Admr., 98.*

FINAL JUDGMENT—See JUDGMENT, 2, 3; *Home Electric Light Co. v. Globe Tissue Paper Co.*, 174.

FORMER ADJUDICATION—See PLEADING, 3; *Duncan v. Lankford, Treas.*, 145.

FRAUDULENT CONVEYANCE—See ATTACHMENT; *Hoffman et al. v. Henderson*, 613.

In an action to set aside a conveyance as fraudulent, the special finding must state fraud as an ultimate fact, see SPECIAL FINDING, 2; *Morgan et al. v. Worden et al.*, 600.

1. *Sale by Husband to Wife*.—*Prima Facie Evidence*.—A *prima facie* case of fraud against creditors is made out, when it is shown that the vendor remained in full possession and management of a livery stable, after having given to his wife a bill of sale therefor. *Higgins v. Spahr et al.*, 167.

2. *Sale by Husband to Wife*.—*Possession*.—*Evidence*.—Where the continued possession and management, by the husband, of property sold to his wife, shows that the sale was *prima facie* fraudulent, the declarations of the husband, while in possession as agent of his wife, to the effect that the sale was made to defeat the claims of certain creditors, is admissible to show fraud. *Ib.*

3. *Design of Parties*.—Where the grantor and grantee unite in a fraudulent design to defraud the creditors of the former, the conveyance under the law will not be protected, although a full consideration was paid by the grantee.

Hoffman et al. v. Henderson, 613.

4. *Evidence*.—In an action to set aside a conveyance as fraudulent a wide range of evidence is permissible in order that the fraud of the particular transaction may be exposed; and it was not error to permit plaintiff to introduce in evidence an alleged fraudulent mortgage executed by defendant to his mother simultaneously with the deed of conveyance to secure a debt represented by a mortgage, but which had been fully satisfied of record for more than ten years prior thereto, and which from the time of the execution until the date of release, a period of more than two years, had never been listed for taxation by mortgagee. *Ib.*

FREE GRAVEL ROADS—

1. *Taxation of City Property for the Repair Of*.—*Statute Construed*.—The act of March 6, 1891, amending section 61, of an act approved March 14, 1867, declaring that no property within the city shall be taxed for the purpose of repairing any road or bridge without the limits of the city does not affect the power given by the act of March, 1879, to tax all property within a county for the repair of free gravel roads or turnpikes, such amendatory act has reference only to the exemption of city property from the ordinary road tax. *Byram v. Board of Commissioners*, 240.

2. *Taxation of City Property for the Repair Of*.—*Validity of Statute*.—Whether or not property within a city is benefited by the repair of free gravel roads and should be taxed in common with other property of the county for that purpose, is a question for the legislature and not for the courts. *Ib.*

HABEAS CORPUS—

Parent and Child.—*Custody of Child*.—At the death of a child's mother, and pursuant to a request of such mother prior to her death, a child six years of age was taken by its grandparent

and boarded and cared for until the child was thirteen years of age; such grandparent having given the child every care and comfort necessary to its welfare and was willing and anxious to continue so to do. The father of the child, who remained a widower, had little property, and was a traveling man with an income of \$50.00 per month. The father took the child from its home with its grandparent and placed it with a relative who was kindly disposed to the child, but was not able financially to furnish the care and comforts provided by the grandparent; the child at the time being in delicate health. The grandparent instituted *habeas corpus* proceedings and was by the trial court awarded the child. *Held*, That the trial court had committed no error. *Hussey v. Whiting*, 580.

HARMLESS ERROR—See APPELLATE PROCEDURE, 6; *Duncan v. Lankford*, *Treas.*, 145.

Error in overruling a demurrer to a paragraph of complaint, when not available on appeal, see APPELLATE PROCEDURE, 14; *Marcia et al. v. Sager*, 261; PRACTICE, 1; *O'Neal v. Hines*, 32.

1. *Demurrer*.—Error in overruling a demurrer to a bad pleading is not available, where the facts alleged therein are found against the party pleading them. *Thrash et al. v. Starbuck et al.*, 673.
2. *Counter-claim*.—To sustain a demurrer to a counter-claim is not available error, where the same facts have been set up and held good as an answer in bar.

Clause Printing Press Co. v. Chicago Trust and Savings Bank, 682.

HISTORICAL FACTS—Courts may take judicial notice of, see EVIDENCE, 4; *Smith et al. v. Pedigo et al.*, 361.

HUSBAND AND WIFE—When wife estopped from denying the validity of a mortgage on lands held by entireties, see ESTATES BY ENTIRETIES; *Trimble et al. v. State, ex rel.*, 154.

1. *Inchoate Interest of Wife in Husband's Real Estate*.—*Dower*.—*Effect of Divorce*.—*Statutes Construed*.—Where a wife has been divorced from her husband, on account of his misconduct, she is not entitled, on the death of the husband, to any interest in his real estate, under sections 2640, 2652, and 2660, Burns' R. S. 1894 (2483, 2491, and 2499, R. S. 1881), conveyed by him during such marriage, and in the conveyance of which she did not join. *Fletcher v. Monroe et al.*, 56.
2. *Divorce*.—*Effect of on Property Rights*.—*Alimony*.—A judgment of divorce settles all questions of the divorced wife to a provision, by way of alimony, and such decree settles all questions concerning property rights, growing out of the marital relation. *Ib.*
3. *Divorce*.—*Effect of on Property Rights, Where Divorce is Granted for the Misconduct of the Husband*.—*Statute Construed*.—Section 1053, Burns' R. S. 1894 (1043, R. S. 1881), providing that, "a divorce granted for the misconduct of the husband shall entitle the wife to the same rights, so far as her real estate is concerned, that she would have been entitled to by his death," has reference to her separate real estate, and does not apply to her husband's real estate. *Ib.*
4. *Marriage*.—*Common Law Rule*.—At common law a valid marriage made the husband and wife one person in law. The legal existence of the woman was suspended or merged in that of her husband. *Henneger v. Lomas*, 287.
5. *Ante-Nuptial Injuries by Husband*.—*Action*.—*Common Law Rule*.—The common law rule that marriage extinguished all rights

of action in favor of the wife against the husband for ante-nuptial injuries to her person or character has not been abrogated in this State. *Ib.*

INCHOATE INTEREST—How affected by divorce, see **HUSBAND AND WIFE**, 1; *Fletcher v. Monroe et al.*, 56.

Post-nuptial agreement as to, see **DIVORCE** 3; *Hilbish v. Hattle*, 59.

INDIANAPOLIS CITY CHARTER—See **POLICE COURT**, 1, 2; *Stevenson v. Anderson*, 304.

INDICTMENT—Sufficiency of for murder, see **CRIMINAL PROCEDURE**, 2; *Drake v. State*, 210.

For larceny of partnership property, see **LARCENY**; *Wantland v. State*, 38.

1. *Sufficiency Of.*—*Embezzlement of County Funds by Deputy County Treasurer.*—An indictment against a deputy county treasurer, charging him with embezzlement of county funds, is not bad, for the reason that the indictment charged that the money so embezzled was the property of the county. *Armstrong v. State*, 609.

2. *Statute of Limitations.*—*Statute Construed.*—*Embezzlement.*—*Answer.*—An indictment against a deputy county treasurer, for embezzlement of county funds, returned in November, 1893, when such deputy served as such officer from August 18, 1891, to August 18, 1893, is not bad for failure to state the time at which the crime was committed, under section 1825, Burns' R. S. 1894 (section 1756, R. S. 1881); for the reason that time is not of the essence of the offense. *Ib.*

INJUNCTION—In an action to enjoin the collection of a portion of a ditch assessment, see **PLEADING**, 3; *Duncan v. Lankford, Treas.*, 145.

Restraining the violation of an agreement not to engage in a rival business, see **CONTRACT**, 4; *O'Neal v. Hines*, 32.

INSTRUCTIONS TO JURY—Defective instructions, when not reversible error, see **APPELLATE PROCEDURE**, 4; *Voght v. State*, 12. How made part of record without bill of exceptions, see **APPELLATE PROCEDURE**, 7; *Roose v. Roöse et al.*, 162.

When comments on instructions by counsel do not amount to reversible error, see **MISCONDUCT OF COUNSEL**; *Humbarger v. Carey*, 324.

Must be copied by the clerk in order to become part of the record, see **RECORD**, 4; *Carlson v. State*, 650.

When not objectionable when construed with other instructions, see **TRIAL**, 1; *Voght v. State*, 12.

What constitutes a waiver of the requirement that the instructions must be in writing, see **TRIAL**, 3. *Ib.*

1. *Assault and Battery.*—*Intent.*—An intent to kill may be inferred, from an assault and battery with a deadly weapon used in such a manner as to be reasonably calculated to destroy life. *Ib.*

2. *Self-defense.*—An instruction to the effect that the defendant might lawfully act upon his own belief of danger to himself, at the time of the shooting, is a sufficient statement of defendant's rights. *Ib.*

3. *When Presumed to be Properly in Record.—Certificate of Clerk.*—An objection to the consideration, by the Supreme Court, of instructions given and refused, for the reason that the instructions contained in the record are the original instructions as given by this court, is not tenable, where it does not appear certainly that the instructions are not transcripts of the originals, and where the clerk certifies that they are. *Wantland v. State, 38.*
4. *Larceny.—Circumstantial Evidence.*—The defendant, in a criminal case, is entitled to an instruction upon request, that in order to convict on circumstantial evidence, the circumstances, must be so strong as to exclude every other reasonable hypothesis except that of the defendant's guilt, if such instruction is applicable to the evidence in the case. *Ib.*
5. *Refusal to Give Instructions.—Defective Record.*—The refusal to give requested instructions is not available error, where the record fails to show affirmatively that the instructions purporting to have been given by the court on its own volition, were all the instructions given in the cause. *Wilson v. Johnson, 40.*
6. *Agent's Commission.*—In an action on the *quantum meruit* for commission in the sale of goods an instruction that if the jury should find from a preponderance of the evidence in favor of the plaintiff they should assess such reasonable compensation as they should determine from a preponderance of the evidence he should receive for the services performed, is not erroneous where the evidence showed that the sale was made to another and different party than as alleged in the complaint. *Jenney Electric Co. v. Branham, 314.*
7. *Credibility of Witnesses.*—It is not error to instruct a jury that in determining the credibility of witnesses the jurors may take into account their experience and relations among men. *Ib.*
8. *When Not Prejudicial to Defendant.*—An instruction to the jury in a trial for murder in the first degree that they might find the defendant guilty of either voluntary or involuntary manslaughter, although not recognized as distinct crimes by statute, was not prejudicial to defendant. *Pigg v. State, 560.*
9. *When Erroneous Instruction Given is Not Reversible Error.*—An erroneous instruction on the subject of murder is not prejudicial to defendant, where he is found guilty of manslaughter only. *Ib.*

INTENT—When an intent to kill may be inferred from an assault and battery, see INSTRUCTIONS TO JURY, 1; *Voght v. State, 12.*

INTOXICATING LIQUORS—

1. *Application for License a Judicial Proceeding.*—The proceeding, under the act of 1875 for a license to sell intoxicating liquors, is a judicial proceeding. *Castle v. Bell et al., 8.*
2. *Application for License.—Burden of Proof.*—A petitioner for a license to sell intoxicating liquors, has the burden cast upon him to prove that he is not in the habit of becoming intoxicated and is otherwise, under the law, a fit person to be intrusted with a license to sell such liquors. *Ib.*
3. *Remonstrance Against Application for License.—Signing by Attorney.—Statute Construed.*—Under section 7278, Burns' R. S. 1894 (5314, R. S. 1881), authorizing any voter of the township, wherein an applicant for a license desires to retail intoxicating liquors, to remonstrate in writing against the granting of the license, on the ground of immorality or other unfitness of such applicant,

the right of such voter or voters may be exercised through the agency of a duly authorized attorney; and a motion to strike out a remonstrance, because signed by such attorney, was properly overruled. *Ib.*

4. *Nicholson Law.—Subject-matter and Title of Act.—Constitutional Law.*—The subject of the Act of March 11, 1895, known as the "Nicholson Law," as expressed in its title is "The better regulation and restriction of the sale of intoxicating liquors;" and the matters connected therewith, are the provisions providing for its enforcement and penalties for its violation, for a remonstrance against the granting of license, and conferring jurisdiction upon the courts in event of its violation; all of which are germane to the subject and not in contravention of Art. 4, section 19, of the constitution. *p. 459. State v. Gerhardt, 439.*
5. *Acts of 1895, and of 1875, Construed Together.—Other Business in Room Where Liquors are Sold.*—The proviso in section 2, Act of March 11, 1895, giving the board of county commissioners power to grant or refuse permission to carry on other business in the same room where intoxicating liquors are sold, when construed with sections 3 and 4, Act of March 17, 1875, which makes the granting of such permission depend on the personal fitness of such applicant, is not open to the objection that it confers absolute and arbitrary power upon the commissioners; and does not, therefore, invalidate the law. *p. 463. Ib.*
6. *Closing of Saloon at Time When Sale is Forbidden.*—It is within the power of the legislature to require a saloonkeeper to securely close his saloon and permit no one to enter during the time when the sale of liquors is forbidden. *p. 466. Ib.*
7. *Persons in Saloon at Prohibited Hours.—Prima Facie Evidence.—Statute Construed.*—Section 3, Act of March 11, 1895, making the fact that persons are permitted to go in and out of a saloon on days or hours when the sale of liquor is prohibited, *prima facie* evidence of guilt upon trial of a cause charging the saloonkeeper with violation of the law in the sale of liquor at such prohibited times, is valid. *p. 466. Ib.*
8. *License Not a Contract.*—A license to engage in the liquor traffic is not a contract or grant, but a mere permit, and the applicant who receives it does so with the knowledge that it is at all times within the control of the legislature. *p. 467. Ib.*
9. *Violation of Statute May be Without Violating Every Provision.—Constitutional Law.*—Under the general provision "For a violation of this or either of the foregoing sections of this act, the defendant shall be fined," etc., it is not necessary that all the provisions of a section be violated in order to make one liable to a fine. *p. 467. Ib.*
10. *License. — Remonstrance. — County Commissioners. — Constitutional Law.*—Section 9, Act of March 11, 1895, providing that, if three days before any regular session of the board of commissioners of any county, a remonstrance in writing signed by a majority of the legal voters of any township, or ward in any city situated in the county, shall be filed against the granting of a license to any applicant for the sale of intoxicating liquors, it shall be unlawful to grant such license for a period of two years, etc., is not unconstitutional as delegating legislative power to the people to suspend the general license law. *p. 468. Ib.*

11. *License.—Remonstrance.—When Remonstrator May Not Withdraw His Name*—Under section 9, Act of March 11, 1895, providing that, if three days before the regular session of the board of county commissioners, a majority of the legal voters shall sign and file a remonstrance, the license shall not be granted, a withdrawal of one's name from a remonstrance can not be made after the beginning of the third day before such meeting. *p. 473. Ib.*
12. *License.—Remonstrance.—General Remonstrance Not Sufficient.—Statute Construed.*—The remonstrance against the issuing of license to sell intoxicating liquors, provided in section 9, Act of March 11, 1895, must apply to a particular applicant and against whom it is addressed, a general remonstrance is not sufficient. *p. 474. Ib.*
13. *Application for License.—Appeal from Board of Commissioners.*—Where an application to the board of commissioners for a license to sell intoxicating liquors is dismissed, by virtue of the required remonstrance, an appeal will lie to the circuit court. *Wilson et al. v. Mathis, 493.*
14. *Remonstrance.—Statute Construed.*—Under section 9, Act of March 11, 1895, the remonstrance must be directed against a particular applicant; a general remonstrance would not be sufficient. *Ib.*
15. *Separate Remonstrances.*—Voters may exercise the right to remonstrate by separate remonstrances, all directed against the same particular applicant. *Ib.*
16. *Remonstrance.—Time of Filing.—Statute Construed.*—A remonstrance to the granting of a license to sell intoxicating liquors, filed on Thursday next preceding the Monday on which the session of the board of commissioners commenced, is in time, under section 9, Act of March 11, 1895, requiring same to be filed three days before the session. *Flynn v. Taylor et al., 533.*
17. *Remonstrance.—Several Remonstrances May be Considered as One.—License.*—Several copies of a remonstrance to the granting of a license to sell liquor, each of which is signed by different voters and filed as a remonstrance, will be considered as only one remonstrance. *Ib.*
18. *License.—Remonstrance.—Constitutional Law.*—Section 9, Act of March 11, 1895, allowing a majority of the voters of a township or ward by remonstrance to prevent the granting of a license to sell intoxicating liquors, is constitutional. *Ib.*

JUDICIAL NOTICE—The court may take judicial notice of historical facts, see EVIDENCE, 4; *Smith et al. v. Pedigo et al., 361.*

JUDGE—

1. *Appointment of Special Judge.*—Only a regular judge may appoint a special judge in his place. *Smith v. State, 176.*
2. *Appointment of Special Judge.—Attorney.*—When a regular judge for any reason is disqualified from sitting in any cause, he is authorized under section 1839, Burns' R. S. 1894, to appoint any competent disinterested attorney of this State as special judge, if in his opinion another regular judge cannot be readily obtained. *Ib.*

JUDGMENT—Error in rendition of, how reached, see APPELLATE PROCEDURE, 88; *Thrash et al. v. Starbuck et al., 673.*

A motion to modify prior to the rendition thereof is properly overruled, see PRACTICE, 12; *Hoffman et al. v. Henderson, 613.*

1. *Injunction. — Drainage. — Township Trustee. — Former Adjudication.*—A judgment in favor of a township trustee, in an action by an allottee of a public ditch, to enjoin the trustee from cutting the channel in his allotment deeper than required by the original plans and specifications, in which the trustee answered by alleging that the allottee had pretended to clean out his allotment, but had failed to clean to the depth required by the original plans and specifications; and that as such trustee he had refused to accept the work done by him, and that he proceeded to clean the same out to the original depth and width, is conclusive as to the right of the trustee to clean the allotment, in a subsequent action to enjoin the county treasurer from collecting the expense of cleaning out the same. *Zimmerman, Treas., v. Savage, 124.*
2. *Definition of Final Judgment.*—A final judgment is one which determines the rights of the parties in the suit, or a distinct and definite branch of it, and reserves no further question or direction for future determination. *Home Electric Light, etc., Co. v. Globe Tissue Paper Co., 174.*
3. *Entry. — Appealable Judgment.*—An entry by the court, in a civil action, that it found defendant guilty of contempt of court and "now assesses a fine of \$100.00 against the defendant, reserving the right to remit all or any part of said fine at any time before the final disposition of this cause" is not a final and appealable judgment. *Ib.*

LANDLORD AND TENANT—

1. *Action for Waste. — Pleading. — Complaint.*—A complaint is not sufficient to show waste by tenant, by allegations of threats to remove furniture of a room, and that the plumbing will have to be taken out and the floor disturbed, without alleging that damage will result. *Bucklen v. Cushman, 51.*
2. *Parol Lease. — Presumption.*—Where the allegations in a pleading do not disclose a written lease, the presumption will be that the letting was by parol, and it will not be necessary that a copy be set out as an exhibit. *Ib.*
3. *Right of Tenant.*—It is the right of a tenant to use leased premises for any lawful purpose, not forbidden by the expressed or necessarily implied construction of the lease. *Ib.*

LARCENY—

Partnership Property. — Indictment. — Variance. — Statute Construed.—Proof that stolen goods belonged to a partnership is not a fatal variance from the averment in an indictment for larceny that they belonged to a member thereof, in view of the statute, section 1822, Burns' R. S. 1894 (section 1753, R. S. 1881). *Wantland v. State, 38.*

LIEN—See MECHANIC'S LIEN.

- A vendor of personal property has no lien for the unpaid purchase-money after parting with the possession of the property, see **VENDOR AND PURCHASER, 2; Slack et al. v. Collins et al., 569.**
- An equitable lien upon real estate does not result from the sale of personal property used in the erection of buildings upon such real estate, see **SALES, 2; Ib.**
- A parol agreement that the vendor of lumber used in the improvement of real estate should have a lien on the real estate for the purchase-price thereof is within the Statute of Frauds, see **SALES, 1; Ib.**

LIQUOR LICENSE—Is not a contract, see **INTOXICATING LIQUORS**, 8; *State v. Gerhardt*, 439.

Application to sell liquor, a judicial proceeding, see **INTOXICATING LIQUORS**, 1; *Castle v. Bell et al.*, 8.

1. *Remonstrance*.—*Statute Construed*.—A remonstrance against granting a liquor license under section 9, Act of 1895 (Acts of 1895, p. 248), directed against "John W. Thompson or any applicant," is against John W. Thompson; the words "or any applicant" may be rejected as surplusage. *Thompson v. Hiatt et al.*, 530.

2. *Christian Name*.—*Remonstrance*.—*Name of Remonstrator*.—*Statute Construed*.—A remonstrator under section 9, Act of 1895 (Acts of 1895, p. 248), may employ initials to indicate his Christian name in subscribing a remonstrance against the granting of a liquor license, provided he write his surname in full.

Collins v. Marvill et al., 531.

LONGHAND MANUSCRIPT OF EVIDENCE—Authentication of, see **APPELLATE PROCEDURE**, 22; *Tron et al. v. Yohn, Admr.*, 272.

By whom filed, see **APPELLATE PROCEDURE**, 3; *Indiana, etc., R. R. Co. v. Lynch et al.*, 1.

When must be filed with clerk, see **APPELLATE PROCEDURE**, 2, 9, 15, 37; *Ib*; *Smith v. State*, 176; *Marvin et al. v. Sager*, 261; *Thrash et al. v. Starbuck et al.*, 673.

MANDAMUS—

Trial by Jury.—An issue of fact, in mandamus proceedings, must be tried by jury if demanded by either party.

Mott et al. v. State, ex rel., 353.

MARRIAGE—Effect of at common law, see **HUSBAND AND WIFE**, 4; *Henneger v. Lomas*, 287.

A woman who marries her seducer and afterwards procures a divorce cannot maintain an action for seduction against him, see **SEDUCTION**, 1; *Ib*.

Extinguishes all rights of action in favor of the wife against the husband for ante-nuptial injuries to her person or character, see **HUSBAND AND WIFE**, 5; *Ib*.

1. *Fraudulent Marriage Voidable*.—A marriage which is procured by fraud is voidable at the suit of the injured party, and may be declared void by judicial decree; and for such purpose the courts have jurisdiction independently of any divorce law. *Ib*.

2. *Girl Under Sixteen Incapable of Entering Into Marriage Contract*.—*Ratification*.—A girl under the age of sixteen years is legally incapacitated from contracting marriage, and she may have her marriage annulled on that ground unless she ratified the marriage after she arrived at the age of sixteen. *Ib*.

MASTER AND SERVANT—

1. *Contributory Negligence*.—A railroad brakeman is guilty of contributory negligence in descending a ladder at the side of a car, for his own purposes, with his face toward the car, without looking for a water plug or crane standing so near the car as to be dangerous; which was open and obvious to all, and which he had passed almost daily for six months preceding the accident.

Pennsylvania Co. v. Finney, Admr., 551.

2. *Contributory Negligence.—Burden of Proof.*—Plaintiff, in an action for the death of an employe, must affirmatively show by the evidence, not only negligence on the part of the master, but freedom therefrom on the part of the servant; and when the evidence in the record fails to prove this fact the judgment upon appeal to this court must be reversed. *Ib.*

MECHANIC'S LIEN—As to the assignment of a lien; see opinion in *Jenckes v. Jenckes et al.*, 634.

1. *Who May Hold Lien.—When Lien Lost.*—The mechanic's lien law was enacted for the benefit of contractors, mechanics, laborers, and materialmen and when payment is made to such persons by the proprietor himself or by any one else on his order, the right to a lien under the statute becomes at once extinguished. *Ib.*
2. *Mortgage.—Priority.*—Under section 3350, Burns' R. S. 1894 (2931, R. S. 1881), a mortgage not recorded until several months after its execution and after rights to mechanics' liens had been created against the property so mortgaged, is inferior to such liens although notice of them was not filed until after the mortgage was recorded. *Ib.*
3. *Mortgage.—Priority.*—Where one acquires a mortgage lien on property with knowledge of the uses and purposes to which such property was applied by its owner, and with notice that under the statute the mortgaged property was liable to be subjected to after acquired liens for labor and material, or, in case of failing circumstances of mortgagor, to claims which would be preferred debts, whether notice of liens should be filed or not, such statutory provisions enter into and form a part of the mortgage, and the mortgage lien is subject to such statutory liens as may thereafter attach to the property. *Ib.*
4. *Notice.—When not Necessary.—Statute Construed.*—Under section 7255 Burns' R. S. 1894, when the debtor is in failing circumstances the filing of notice of a mechanic's lien is dispensed with, and all claims become preferred debts as fully as if they had been made liens by notice duly filed. *Ib.*

MENTAL CAPACITY—The mental capacity requisite to the performance of a valid act is a mixed question of law and fact, see *Teegarden et ux. v. Lewis, Admr.*, 98.

MISCONDUCT OF COUNSEL—When a reversal will be ordered by the Supreme Court for misconduct of counsel in argument to jury, see *TRIAL*, 4; *Roose v. Roose et al.*, 162.

1. *Comments on Instructions to Jury.—When Not Reversible Error.*—Disparaging references made by plaintiff's attorney to instructions prepared by defendant, and given by the court, will not amount to reversible error where such references did not amount to comments upon the law of the instructions. *Humbarger v. Carey*, 324.
2. *Statement to Jury.—When Not Reversible Error.*—A statement made by the assistant prosecuting attorney, on a trial for murder, in the opening statement to the jury, that the reason murders were so frequent in the county was because life was held so cheap, is not cause for reversal on appeal, where the jury was instructed not to consider the same and counsel was told not to go outside the record. *Pigg v. State*, 560.

MISCONDUCT OF JUROR—When the decision of the trial court with reference thereto will not be reviewed on appeal, see **TRIAL**, 5; *Roose v. Roose et al.*, 162.

MONOMANIA—When testamentary capacity is not denied to a monomaniac, see **WILLS**, 12; *Young et al. v. Miller et al.*, 652.

Proof that testator was a monomaniac does not require defendant to show by a preponderance of the evidence that such monomania did not enter into the execution of the will, see **WILLS**, 11; *Ib.*

MORTGAGE—See **CHATTEL MORTGAGE**; **SCHOOL FUND MORTGAGE**.
When inferior to mechanic's lien, see **MECHANIC'S LIEN**, 2, 3; *Jenckes v. Jenckes et al.*, 624.

When does not amount to a voluntary assignment, see **VOLUNTARY ASSIGNMENT**; *Morgan et al. v. Worden et al.*, 600.

MUNICIPAL CORPORATION—See **ESTOPPEL**; *Rhodes v. Town of Brightwood*, 21.

Property within a municipal corporation is not exempt from taxation for the repair of free gravel roads within the county, see **TAXATION**; *Byram v. Board of Commissioners*, 240.

When land is dedicated to, see **DEDICATION**, 1, 2, 3; *Rhodes v. Town of Brightwood*, 21.

1. *Street Improvement.—Town Ordinance For.—Statutes Construed.*—A town may, by ordinance, require property-owners to pave sidewalks with brick, stone, or cement, under sections 4394 to 4397, Burns' R. S. 1894 (3357 to 3360, R. S. 1881), notwithstanding the grade therefor had been established years before, and board sidewalks laid thereon at such time.

Keith et al. v. Wilson et al., 149.

2. *Street Improvements.—Town Boards May Make with or without Petition.*—Under sections 4394 to 4397, Burns' R. S. 1894 (3357 to 3360, R. S. 1881), the board of trustees of towns may improve sidewalks without petition from the adjacent property-owners, when in the opinion of such board of trustees public convenience requires such improvements to be made. *Ib.*

3. *Refunding Bonds.—Statute Construed.*—Under act of March 3, 1877, authorizing the funding of city indebtedness, funding bonds which have passed into the hands of innocent and good-faith purchasers, are not subject to defense by the city, and, as a *bona fide* indebtedness, are subject to be refunded.

Myers v. City of Jeffersonville et al., 431.

4. *Constitutional Amendment.—Municipal Indebtedness.*—The constitutional amendment of March 14, 1881 (section 220, Burns' R. S. 1894), limiting the amount of indebtedness to be incurred by municipalities to two per cent. of the taxable property, does not render invalid prior indebtedness exceeding that limit, nor deny the right of a city so indebted to refund such debt by the issue of new bonds. *Ib.*

5. *Courthouse.—County Seat Removal.—Injunction.*—Money borrowed by a city to defray the expense of litigation, involving the removal of a county seat, and the cost of a lot and the building of a courthouse and jail for a county, is unauthorized; and bonds issued to secure the money so borrowed have not such validity in the hands of any holder as to preclude a citizen and taxpayer from the right of injunction to prevent the refunding of such bonds. *Ib.*

MUNICIPAL DEBT—See MUNICIPAL CORPORATIONS, 4; *Ib.*

Money borrowed by city to defray the expense in the removal of a county seat and the construction of a courthouse and jail for a county is unauthorized, see MUNICIPAL CORPORATIONS, 5; *Ib.*

MURDER—See CRIMINAL PROCEDURE, 2; *Drake v. State*, 210.**NEGLIGENCE**—

1. *Liability of Contractor to Third Party For*.—A contractor is not liable to a third party, to whom he owed no duty, who was killed by a falling building which was remodeled and reconstructed by such contractor, in a careless and negligent manner, about two years prior to the time of the disaster, and which fell, by reason of such negligent and imperfect reconstruction.
Daugherty v. Herzog, 255.

2. *Proximate Cause of Injury*.—Where a railroad company negligently obstructed a public street of a city with a train of cars, thereby preventing travel across such street for an unreasonable length of time, such obstruction was not the proximate cause of an injury received by a pedestrian who, without negligence in passing around such obstruction, caught her foot on a stone, lying across the gutter between the street and sidewalk, and was injured.
Enochs v. Pittsburgh, etc., R. W. Co., 635.

NEW TRIAL—When cause for is based upon the alleged misconduct of a juror, see TRIAL, 5; *Roose v. Roose et al.*, 162.

1. *Complaint*.—*Newly-Discovered Evidence*.—In an action to obtain a new trial, on the ground of newly-discovered evidence, all the facts essential to the validity of the complaint must be set out in the body of the complaint. The pleadings and evidence in the original case, though referred to and made a part of the complaint, cannot be considered.
Davis v. Davis et al., 4.
2. *Complaint*.—*Newly-Discovered Evidence*.—*Due Diligence*.—A complaint in an action for a new trial, on the ground of newly-discovered evidence, must state the facts constituting the diligence used to obtain the evidence before the trial. The mere statement that inquiries were made, is not sufficient.
Ib.
3. *Complaint*.—*Newly-Discovered Evidence*.—In an action for a new trial, by reason of newly-discovered evidence, where a deposition of a witness introduced in the original cause has been lost, an allegation in the complaint that such deposition is lost, with a substantial statement of the evidence, is sufficient; but such averments must be established by proper evidence at the trial of the issues joined on the complaint for a new trial.
Ib.
4. *Excessive Damages*.—*Tort*.—Excessive damages is a cause for a new trial in cases of tort only.
Marvin et al. v. Sager, 261.
5. *Failure of Counsel to Argue*.—*Error Waived*.—Where counsel for appellant fail to argue an error assigned it will be considered waived.
Ib.

NEWSPAPER—When of general circulation, see SERVICE BY PUBLICATION; *Lynn v. Allen*, 584.**NICHOLSON LAW**—See LIQUOR LICENSE; INTOXICATING LIQUORS; CONSTITUTIONAL LAW, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14; *Thompson v. Hiatt et al.*, 530; *Collins v. Marvil et al.*, 531; *Castle v. Bell et al.*, 8; *Flynn v. Taylor et al.*, 533; *Wilson et al. v. Mathis*, 493; *State v. Gerhardt*, 439.

Title of act is germane to the subject and not in contravention of Art. 4, section 19, of the constitution, see **INTOXICATING LIQUORS**, 4; *State v. Gerhardt*, 439.

NOTICE—See **CONSTRUCTIVE NOTICE**.

When the debtor is in failing circumstances the filing of notice of a mechanic's lien is dispensed with, see **MECHANIC'S LIEN**, 4; *Jenckes v. Jenckes et al.*, 624.

OFFICERS—

1. See **STATE OFFICER**.—*Vacancy in Office of City Treasurer*.—*Tenure of Appointee*.—*City Council*.—*Statutes Construed*.—Where, under section 8483, Burns' R. S. 1894 (3050, R. S. 1881), a person is elected by a city council to fill a vacancy in the office of city treasurer, caused by the death of the regularly elected incumbent, he is, under section 7583, Burns' R. S. 1894 (5567, R. S. 1881), entitled to the office for the entire unexpired term for which his predecessor was elected. *Carson v. State, ex rel.*, 348.
2. *Township Trustee*.—*Failure to File Bond within Time Required by Law*.—*Statute Construed*.—A township trustee, elected at the general election in November, 1894, whose term of office might have begun at any time within ten days after his election, does not forfeit the office by failing to file his bond and oath of office within ten days after his election as required by section 7542, Burns' R. S. 1894 (5527, R. S. 1881). *Albaugh v. State, ex rel.*, 356.
3. *Township Trustee*.—*Failure to Qualify*.—*Compensation*.—A township trustee who, through his own mistake and that of others as to the time when his term of office rightfully began, failed to qualify till after such time, is entitled to compensation only from the time he lawfully qualified and was rightfully entitled to the office. *Ib.*
4. *County Treasurer*.—*Loaning County Funds*.—A county treasurer, who loans the county funds, in violation of section 2019, Burns' R. S. 1894 (1942, R. S. 1881), cannot maintain an action for the recovery of the same; although the county itself might maintain such action. *Winchester Electric Light Co. v. Veal*, 506.

OPINION EVIDENCE—When witness may give an opinion as to the value of particular services rendered, see **EVIDENCE**, 3; *Jenney Electric Co. v. Branham*, 314.

PARENT AND CHILD—Custody of child, see **HABEAS CORPUS**; *Hussey v. Whiting*, 580.

Presumption of fraud in business transactions between them, see **PRACTICE**, 6; *Teegarden et ux v. Lewis, Admr.*, 98.

1. *Custody of Minor Child*.—*Welfare of Child*.—Ordinarily the parent is entitled to the custody of his minor child; but where the welfare of the child is retarded by the custody of the parent, an exception to the ordinary rule exists. *Hussey v. Whiting*, 580.
2. *Parent's Oral Agreement as to Custody of Child*.—An oral agreement, express or implied, made by a parent, that another should have the custody of his child during infancy, will not preclude the parent reclaiming such child. *Ib.*

PARI MATERIA—As to construction of statutes, see **CONSTITUTIONAL LAW**, 13; *State v. Gerhardt*, 439.

PARKS—How affected by annexation to town or city, see DEDICATION, 4; *Rhodes v. Town of Brightwood*, 21.

Lands dedicated as, see DEDICATION, 1, 2, 3; *Ib.*

PAROL EVIDENCE—In contradiction of a recorded plat of land, see DEDICATION, 2; *Ib.*

Cannot be introduced in contradiction of a written compact, see EVIDENCE, 5; *Smith et al. v. Pedigo et al.*, 361.

PARTIES—When co-parties must be joined in an appeal, see APPELLATE PROCEDURE, 25; *Roach v. Baker et al.*, 330.

All parties to a judgment must be made parties in the assignment of error, see APPELLATE PROCEDURE, 27; *Moore v. Franklin et al.*, 344.

PARTNERSHIP—See RECEIVERSHIP, 1; *Davis v. Niswonger*, 426.

Action for Dissolution.—Sale of Mortgaged Property Under Foreclosure.—A foreclosure sale of all the property of a partnership effects its dissolution; and an action cannot thereafter be maintained for dissolution. *Ib.*

PETITION—To tile open drain, how signed, see DRAINAGE, 4; *Poundstone et al. v. Baldwin*, 139.

PLEADING—When a complaint contains sufficient allegations to show waste, see LANDLORD AND TENANT, 1; *Bucklen v. Cushman*, 51.

Original paragraphs of a pleading which have been superseded by amended ones will not be reviewed by the Supreme Court, see APPELLATE PROCEDURE, 33; *Hedrick et al. v. Whitehorn et al.*, 642.

1. *Complaint.—Sufficiency Of.—Breach of Contract.*—A complaint alleging that plaintiff and defendant had been partners in business; that defendant for a certain consideration offered to surrender his interest in the firm to plaintiff, and not to engage in the business in the town so long as plaintiff continued in the business in said town; and for these considerations consummated the trade and fully complied with the agreement, sufficiently alleges a contract on defendant's part not to engage in such business.

O'Neal v. Hines, 32.

2. *Complaint.—Injunction.—Damages.—Township Trustee.*—In an action to enjoin a county treasurer from collecting the expense of cleaning out and repairing an allotment of a public ditch, an allegation in the complaint that the plaintiff cleaned the allotment to the depth originally established, for the year for which it is claimed the township trustee cleaned the same, does not negative the legal right of the latter to clean the ditch for that year, in the absence of an allegation that plaintiff's work was to the acceptance of the trustee, as the trustee may determine that an allotment has not been properly cleaned out and repaired, and his decision made in good faith is final.

Zimmerman, Treas., v. Savage, 124.

3. *Collateral Attack.—Former Adjudication.—Injunction.—Drainage.*—A suit to enjoin the collection of a portion of an additional ditch assessment, the correctness and legality of which have been adjudicated, is a collateral attack, and cannot be sustained on the ground that the original assessment should have been deducted therefrom.

Duncan v. Lankford, Treas., 145.

4. *Common Count. — Recovery. — Evidence. —* *Common* may plead the common count and recover, *notwith-*
standing disclosure of a special contract.
Jenney Electric Co. v.
5. *Answer. — Abatement. —* An answer which pleads a
matter, along with matter in bar, and asks judgment
thereby waives the matter in abatement. *p. 525.*
Smith et al. v. Pe
6. *Complaint in Action to Cancel Deed. —* In an action to
executed by a person of unsound mind, allegations of
grantee of the consideration paid, of a demand for a con-
veyance, and of knowledge on the part of the grantee
ings were with one *non compos mentis*, are sufficient.
Thrash et al. v. Starbuck
7. *Complaint. — Tender. —* Where a grantee procures a
with the knowledge that the grantor is a person of unsound
a tender of the purchase-price is not a necessary prerequisite
suit to annul such conveyance.

POLICE COURT—

1. *Jurisdiction. — Petit Larceny. — Indianapolis City O.*
Statute Construed. — Sections 3887-3891, Burns' R. S.,
amended by the Act of 1895, p. 90 (*Indianapolis City*
Charter, sections 116-120), conferring upon the police judge
concurrent jurisdiction with the criminal courts in all
petit larceny, and all other violations of the laws of the
where the penalty provided therefor cannot exceed a fine of
and imprisonment not exceeding six months, is valid.
Stevens v. Anderson
2. *Jurisdiction. — Criminal Law. — Indianapolis City O.*
Statute Construed. — The jurisdiction of the police court, *auth-*
orized by section 118 of the Indianapolis City Charter, empowering
impose a fine and imprisonment, is not affected by the fact that
general statute fixes the punishment for petit larceny at *imprison-*
ment, fine and disfranchisement.
3. *Right of Trial by Jury. — Constitutional Law. —* The *right*
trial by jury guaranteed by the constitution, is not violated if
statute empowering the police judge, in case he shall deem
punishment he is authorized to assess, inadequate for the offense
to hold the prisoner to bail for appearance before the proper court.

POLICE POWER—Authority of the State is exercised by virtue
in drainage of wet lands, see DRAINAGE, 7; *Gifford Drainage*
district et al. v. Shroer et al., 572.

When a Legislative, and When a Judicial Question. — It is
province of the legislature to decide when the exigency
for the exercise of the police power of the State, but as to
are the subjects which come within it, is a judicial question. *p.*
State v. Gerhardt

POSSESSION—Continued possession by the husband of per-
sonal property sold to his wife as evidence of fraud against creditor
see FRAUDULENT CONVEYANCE, 1, 2; *Higgins v. Spahr et al.*

POST-NUPTIAL CONTRACT—As to inchoate interest in husband's
real estate, see DIVORCE, 3; *Hilbish v. Hattle*, 59.

PRACTICE—When erroneous instruction given is not reversible error, see INSTRUCTIONS TO JURY, 8, 9; *Pigg v. State*, 560.

The Supreme Court considers only the inferential or ultimate facts in a special finding, see SPECIAL FINDING, 2; *Morgan et al. v. Worden et al.*, 600.

Refusal to give requested instructions when not available error, see INSTRUCTIONS TO JURY, 5; *Wilson v. Johnson*, 40.

When not available error in overruling a demurrer to a bad pleading, see HARMLESS ERROR, 1; *Thrash et al. v. Starbuck et al.*, 673.

When sustaining a demurrer to a counter-claim is not available error, see HARMLESS ERROR, 2; *Clause Printing Press Co. v. Chicago Trust and Savings Bank*, 682.

Defendant is not required under the general denial to negative the truth of the plaintiff's *prima facie* case by a preponderance of the evidence, see EVIDENCE, 6; *Young et al. v. Miller et al.*, 652.

1. *Harmless Error.—Special Finding.*—The erroneous overruling of a demurrer to a paragraph of the complaint is harmless, where the special finding follows and sustains the allegation of another paragraph, which is sufficient. *O'Neal v. Hines*, 32.

2. *Motion in Arrest of Judgment.—Dismissal by Court.*—Dismissal of a cause by the court on motion in arrest of judgment for insufficiency of complaint, after a demurrer has been overruled and an exception reserved without allowing an amendment, is error. *Bucklen v. Cushman*, 51.

3. *Special Verdict.—Mental Capacity of Donor.—Gift.*—On the issue as to whether a donor had sufficient mental capacity to make a valid gift *inter vivos*, a finding in a special verdict that the donor was of unsound mind, is a mere conclusion of law and not such a statement of facts as that the court could apply the proper legal conclusions and render judgment. *Teegarden et ux. v. Lewis, Admr.*, 98.

4. *Unsoundness of Mind.—Burden of Proof.*—One who challenges the mental capacity of a testator, or donor, has the burden of establishing the absence of the particular capacity in issue. *Ib.*

5. *Fiduciary.—Burden of Proof.*—One occupying a fiduciary relation must, when the question is made, establish his right in equity and good conscience to any advantage gained by him from or through his principal, or his principal's business. *Ib.*

6. *Parent and Child.—Presumption of Fraud.—Onus of Proof.*—The relation of parent and child, as to presumption of fraud and the *onus* of proof to rebut the same, in business transactions between them, does not stand upon the same footing as the relation of trustee and *cestui que trust*, guardian and ward and the like relations. *Ib.*

7. *Criminal Procedure.—Discharge of Juror After Submission.*—After the acceptance of the jury, and after they are sworn to try the cause, it is too late to examine them as to their competency, or to peremptorily challenge any of their members, unless there be first interposed a motion to set aside the submission. *Kurtz v. State*, 119.

8. *Jurisdiction.—Amended Petition.*—Where the court has acquired jurisdiction over the parties to the original petition, it has authority to allow an amended petition, even though the original was not good on demurrer. *Poundstone et al. v. Baldwin*, 139.

9. *Counter-claim.—Admissibility of Evidence under General Denial.—Foreclosure of Mortgage.*—In an action to foreclose a mortgage given for the purchase-money of real estate, evidence of the difference in quantity of the land as claimed to have been represented by grantor and that conveyed by her, is not admissible in defense of such action under general denial.

Tron et al. v. Yohn, Admx., 272.

10. *Depositions Taken During Progress of the Trial.—Statute Construed.*—Under sections 426 and 427, Burns' R. S. 1894 (423 and 423, R. S. 1881), the court may during the progress of the trial upon proper affidavits permit a party to take and use on such trial, the deposition of an attorney at law who resides in another state and is in ill-health and unable to attend court.

Humbarger v. Carey, 324.

11. *Set-off and Counter-claim.—Demurrer.*—The informality of a demurrer, which was sustained below, cannot be first asserted on appeal for the purpose of upholding answers in set-off and counter-claim, which are, in fact, insufficient.

Blue v. Capital National Bank, 518.

12. *Motion to Modify Judgment.*—A motion to modify a judgment which is made prior to the rendition of such judgment is properly overruled.

Hoffman et al. v. Henderson, 613.

13. *Bill of Exceptions.—Appeal.*—An alleged error in overruling a motion to modify a judgment will not be considered on appeal where same is not presented by bill of exceptions.

Ib.

PRIMA FACIE EVIDENCE—Persons in saloon at prohibited hours, see INTOXICATING LIQUORS, 7; *State v. Gerhardt, 439.*

PRIVATE RIGHTS—Dedication of land to public use not revocable after private rights have accrued, see DEDICATION, 3; *Rhodes v. Town of Brightwood, 21.*

PROXIMATE CAUSE—The unlawful obstruction of a public street of a city by a train of cars is not the proximate cause of an injury to a pedestrian who caught her foot on a stone and was injured in passing around such obstruction, see NEGLIGENCE, 2; *Enochs v. Pittsburgh, etc., R. W. Co., 635.*

PUBLIC POLICY—

Officer.—Loaning Public Funds.—Where public funds are loaned by an officer, in violation of the statute, an action to recover the same cannot be maintained on the ground of public policy, when it does not appear, from the pleadings, that other interests than those of the parties to the contract are concerned.

Winchester Electric Light Co. v. Veal, 506.

PUBLIC UTILITY—Landowners cannot be assessed for improvements unless the public is benefited thereby, see DRAINAGE, 8, 9; *Gifford Drainage District et al. v. Shroer et al., 572.*

PUNCTUATION—Of statutes as an aid in the interpretation thereof, see *Winchester Electric Light Co. v. Veal, 506.*

QUANTUM MERUIT—Admissibility of evidence tending to show contract, see EVIDENCE, 1; *Jenney Electric Co. v. Branham, 314.*

RAILROADS—

Consolidations of Companies.—Filing Articles of Agreement.—Fees for Filing.—Secretary of State.—Condition Precedent.—Under acts 1891, page 84, sections 1 and 2, providing that the Secretary of State shall charge certain fees for filing and recording an agreement for the consolidation of railroad companies and providing that he shall neither file nor record the articles mentioned unless the fees for filing same be first paid, the payment of the fee is a condition precedent to the receiving of the same for filing by the Secretary of State. *State v. Chicago, etc.. R. R. Co. et al., 229.*

REAL ESTATE—Description of, see **DEED**, 1, 2; *Wilson v. Johnson, 40.*

RECEIVERSHIP—

1. *Partnership Property.—Sale on Foreclosure.*—Where partnership property is sold on foreclosure, to the mortgagee, on an agreement that, upon sale of the property by such mortgagee, the residue above the mortgage debt should belong to the partners, and afterward the mortgagee sells the property to one of the partners, a receiver cannot be appointed, even though the partner who buys the property should realize thereon more than the amount of the mortgage debt. *Davis v. Niswonger, 426.*
2. *Appeal.—Practice.—Statute Construed.*—Where, after the appointment of a receiver, a judgment creditor appeared by attorney and asked and was permitted to intervene and move to set aside the order to appoint a receiver, and to dismiss the proceedings, and afterward filed an intervening petition to set aside such order and proceedings, which petition was by the court denied, and a motion for a new trial filed and overruled, an appeal from such rulings to the Supreme Court was in substantial compliance with section 1245, Burns' R. S. 1894 (1231, R. S. 1881). *p. 544.*
State v. Union National Bank et al., 537.
3. *Jurisdiction of Defendant.—Appearance by Non-resident Attorney.*—In an action for the appointment of a receiver, where no summons was issued or publication made against the defendant, an answer written and filed by plaintiff's attorney, signed by a non-resident attorney who was not admitted to practice law in the court where the cause was pending, purporting to appear for the defendant to the action, will not constitute a legal appearance so as to confer jurisdiction, and such proceeding was without jurisdiction and void. *p. 545. Ib.*
4. *Action for Appointment of Receiver.—When Not Authorized.—Statute Construed.*—Receivers are appointed under the provisions of section 1236, Burns' R. S. 1894 (1222, R. S. 1881), in cases where there is an action already pending between the parties. The appointment of a receiver for an individual at the instance of a creditor, not in an auxiliary proceeding but upon a complaint in which the appointment is the sole relief sought, is not authorized either by statute or by common law. *p. 550. Ib.*
5. *Appointment of Receiver.—Jurisdiction of Property.*—If the appointment of a receiver to take possession of the property of an individual upon the complaint of the holder of a chattel mortgage were proper, such appointment could only be for the property covered by the mortgage, and could not include other property. *p. 550. Ib.*

RECORD—When instructions are properly in the record, see **INSTRUCTIONS TO JURY**, 3; *Wantland v. State, 38.*

1. *Mistake of Trial Court.—Where Corrected*—Where the record shows that the bill of exceptions was signed by the judge on November 16, and the bill was filed November 15, by the clerk, if the judge in fact signed such bill on the 15th day of November and the bill was filed thereafter on that day, such error is a mistake in the record of the court below and not in the transcript and can only be corrected by the court in which the mistake was made.
Drake v. State, 210.
2. *Transcript.—Correction of Record of Proceedings in Trial Court.*—The transcript of the proceedings in a cause in this court cannot be corrected by *certiorari* until the mistake or defect in the record of the trial court is properly corrected by said court. *Ib.*
3. *Bill of Exceptions.—Longhand Manuscript of Evidence.*—The filing of the longhand manuscript of the evidence must be antecedent to its being incorporated into the bill of exceptions.
Carlson v. State, 653.
4. *Bill of Exceptions.—Instructions.*—Instructions in order to become a part of the record must be copied by the clerk. *Ib.*

REHEARING—A rehearing will not be granted for the purpose of correcting the record upon *certiorari*, see APPELLATE PROCEDURE, 11; *Drake v. State, 210.*

Attorneys' Fees Part of Judgment.—Where, pending the decision of the Supreme Court, the appellee assigns his judgment in the lower court, retaining an interest to the extent of his attorneys' fees, his petition for a rehearing will not be dismissed.

Winchester Electric Light Co. v. Veal, 506.

RELIGIOUS SOCIETIES—

1. *Religious Freedom.—Right of Church Member.*—The provision of the Federal constitution declaring that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and of the State constitution that "All men shall be secured in their natural right to worship God according to the dictates of their own conscience," do not give to a church-member the right, after he has repudiated the faith and doctrine upon which his church was founded, to exercise and enjoy the benefits and privileges of a member of such church, contrary to the rules and laws upon which such church was established. *p. 365.*
Smith et al. v. Pedigo et al. 361.
2. *Church.—Rules of Decorum.—Change in Articles of Faith.*—Where a church requires of its members that they all subscribe or assent to its articles of faith, a rule of decorum providing that all questions coming before the church shall be disposed of by a majority, except as to the reception of members and the appointment of officers, which shall be by unanimous vote, does not authorize a change in the articles of faith by a majority. *p. 373. Ib.*
3. *Baptist Association.—Church Doctrine.—Evidence.*—Though an organization of Baptist churches, known as an "association," has only advisory power as to questions that may arise in the individual churches comprising the association, yet if two factions of one of the churches, each claiming to be the true church, present their claims to such association, its decision, while not conclusive on the courts, is entitled to very great weight. *p. 385. Ib.*
4. *Ecclesiastical Law.—Jurisdiction of Civil Courts.*—The courts of this State have no ecclesiastical jurisdiction, and will not decide questions of ecclesiastical law, except where such law becomes a

fact upon which the property-rights of religious societies, corporations, or churches depend. p. 375. *Ib.*

5. *Church.—Factions.—Property-rights.*—Where the membership of a church is divided into two factions, each claiming to be the church, the title to the church property is in that faction, even though it be the minority, which is acting in harmony with the doctrines and practices which were accepted and adopted by the church before the division took place. p. 390. *Ib.*
6. *Church.—Factions.—Expulsion of Members who Adhere to Original Faith.—Property-rights.*—Where the membership of a church is divided into two factions, the expulsion by the majority of the members of the minority, who still adhere to the original faith, does not affect the rights of such minority to the church property. p. 412. *Ib.*

REMONSTRANCE—Time of filing, see INTOXICATING LIQUORS, 12; *Flynn v. Taylor et al.*, 533.

Must apply to a particular applicant, see INTOXICATING LIQUORS, 12; *State v. Gerhardt*, 439.

The right of a voter to remonstrate against the granting of a liquor license on the ground of unfitness of applicant may be exercised through the agency of an authorized attorney, see INTOXICATING LIQUORS, 8; *Castle v. Bell*, 8.

Separate remonstrances may be directed against the same applicant for a liquor license, see INTOXICATING LIQUORS, 15, 17; *Wilson et al. v. Mathis*, 493; *Flynn v. Taylor et al.*, 533.

When remonstrator may not withdraw his name from remonstrance, see INTOXICATING LIQUORS, 11; *State v. Gerhardt*, 439.

When parts of remonstrance against granting a liquor license may be rejected as surplusage, see LIQUOR LICENSE, 1; *Thompson v. Hiatt et al.*, 530.

A remonstrator may employ initials to indicate his Christian name in subscribing a remonstrance, see LIQUOR LICENSE, 2; *Collins v. Marvil*, 531.

RESTRAINT OF TRADE—See CONTRACT, 1, 2, 8, 4; *O'Neal v. Hines*, 32.

SALES—See VENDOR AND PURCHASER.

Regularity of tax title sales, see TAX TITLE; *Richard et al. v. Carrie*, 49.

Of personal property by husband to wife, see FRAUDULENT CONVEYANCE, 1, 2; *Higgins v. Spahr et al.*, 167.

Rescission of sale of real estate because of partial failure of title, see VENDOR AND PURCHASER, 8; *Johnson et al. v. Williams*, 645.

A mortgage of real estate by an administrator is invalid under an order of court to sell same, see EXECUTORS AND ADMINISTRATORS; *Edwards v. Baker et al.*, 281.

1. *Personal Property.—Lien.—Parol Agreement.—Statute of Frauds.*—Where lumber is purchased and used in the improvement of real estate, upon a parol agreement that the vendor should have a lien

on the real estate for the purchase-price of the lumber, such agreement is within the Statute of Frauds, and cannot be enforced.

Slack et al. v. Collins et al., 569.

2. *Personal Property.—Equitable Lien.*—An equitable lien upon real estate, does not result from the sale of personal property, even though such personal property was furnished for, and used in the erection of buildings upon such real estate. *Ib.*

SCHOOL FUND MORTGAGE—When wife estopped from denying the validity of, see **ESTATES BY ENTIRETIES**; *Trimble et al. v. State, ex rel.*, 154.

SEDUCTION—

1. *Marriage.—Divorce.—Statute Construed.*—Under section 264, Burns' R. S. 1894, which gives an unmarried woman a right of action for damages for her own seduction, a woman under the age of 21 years who has been seduced, and legally marries her seducer, and afterwards procured a divorce, cannot then maintain an action for damages against him. *Henneger v. Lomas*, 287.
2. *Voidable Marriage.—Decree of Nullity.—Statute Construed.*—Under section 264, Burns' R. S. 1894, a woman who has been seduced and marries her seducer, and the court afterwards on her application, adjudges that her marriage was void, can, after such decree, bring and maintain an action against him for said seduction. *Ib.*

SELF-DEFENSE—When defendant may lawfully act upon his own belief of danger, see **INSTRUCTIONS TO JURY**, 2; *Voght v. State*, 12.

SERVICE BY PUBLICATION—

Newspaper of General Circulation.—Statute Construed.—A daily newspaper devoted to the general dissemination of legal news and containing other matter of general interest to the public, and having a large general circulation, is "a newspaper of general circulation," within the meaning of sections 320, 1299, Burns' R. S. 1894 (316, 1279, R. S. 1881). *Lynn v. Allen et al.*, 584.

SIGNATURE OF JUDGE—When a sufficient signing of a special finding of fact, see **SPECIAL FINDING**, 1; *O'Neal v. Hines*, 32.

SPECIAL FINDING—Omission of material facts, remedy, see **APPELLATE PROCEDURE**, 18; *Banner Cigar Co. et al. v. Kamm & Schillinger Brewing Co. et al.*, 266.

1. *Signature of Judge.—Sufficiency of Signing.*—The signature of the judge following the conclusions of law, is a sufficient signing of a special finding of facts, which precedes the conclusion of law. *O'Neal v. Hines*, 32.
2. *Practice.—Fraudulent Conveyance.*—When there is a special finding of facts in the court below, this court considers only the inferential or ultimate facts it contains and gives no heed to mere matter of evidence; and when in an action to set aside a conveyance as fraudulent the special finding does not state fraud as an ultimate fact the action must fail. *Morgan et al. v. Worden et al.*, 600.

SPECIAL VERDICT—When a mere conclusion of law, see **PRACTICE**, 3; *Tegarden et ux. v. Lewis, Admr.*, 98.

STATE OFFICER—

1. *Fees for Filing Articles of Agreement.—Waiver of Advance Payment.*—Where the statute provides that the fees for filing a docu-

ment shall be paid in advance, and where such fee does not, under the law, go to the officer with whom the same is required to be filed as his own remuneration, but goes into the public treasury for the benefit of the State, such officer cannot waive the advance payment of such fees. *State v. Chicago, etc., R. R. Co. et al.*, 229.

2. *Filing Articles of Agreement*.—When articles of agreement were received by the Secretary of State for the purpose of filing them under sections 1 and 2 of the Acts of 1891, page 84, and payment of this fee for filing same was refused, and such officer declined to file them on account of the refusal to pay the fee, the parties were in the same condition as though the offer to file had not taken place. *Ib.*

STATEMENT TO JURY—When misconduct of counsel in making statement to jury is not cause for reversal, see **MISCONDUCT OF COUNSEL**, 2; *Pigg v. State*, 560.

STATUTE OF FRAUDS—An agreement not to engage in a rival business so long as the other party remains in such business is not within, see **CONTRACT**, 2, *O'Neal v. Hines*, 32.

Parol promise of beneficiary to transfer real estate or personal property exceeding fifty dollars in value is within the Statute of Frauds, see **WILLS**, 8; *Orth et al. v. Orth et al.* 184.

A parol agreement that the vendor of lumber, used in the improvement of real estate, should have a lien on the real estate for the purchase-price thereof is within the Statute of Frauds, see **SALES**, 1; *Slack et al. v. Collins et al.*, 569.

STATUTORY CONSTRUCTION—See **CONSTITUTIONAL LAW**, 5, 6, 7, 8, 9, 10, 11, 12, 13; *State v. Gerhardt*, 439.

Punctuation of the statutes as an aid in the interpretation thereof, see *Winchester Electric Light Co. v. Veal*, 506.

A statute will not be declared unconstitutional solely on the ground of unjust and oppressive provisions, see **CONSTITUTIONAL LAW**, 6; *State v. Gerhardt*, 439.

All presumptions must be indulged in favor of the validity of a statute, see **CONSTITUTIONAL LAW**, 7; *Ib.*

When invalidity of one section does not invalidate entire act, see **CONSTITUTIONAL LAW**, 9; *Ib.*

Amendment by implication, see **CONSTITUTIONAL LAW**, 10; *Ib.*

Continued practice of legislature as a factor in aiding the court in the interpretation of the constitution, see **CONSTITUTIONAL LAW**, 11; *Ib.*

When statutes may be construed together, see **CONSTITUTIONAL LAW**, 13; *Ib.*

A Statute May be Unconstitutional in Part, and Valid as to Residue.—A statute may be unconstitutional in part and valid as to the residue, and if the unconstitutional portions can be stricken out, and still leave an operative statute, the unconstitutional portions must be regarded as eliminated and the remainder be enforced.

Taggart, Auditor, et al. v. Claypool, 590.

MISCONDUCT OF JUROR—When the decision of the trial court with reference thereto will not be reviewed on appeal, see **TRIAL**, 5; *Roose v. Roose et al.*, 162.

MONOMANIA—When testamentary capacity is not denied to a monomaniac, see **WILLS**, 12; *Young et al. v. Miller et al.*, 652.

Proof that testator was a monomaniac does not require defendant to show by a preponderance of the evidence that such monomania did not enter into the execution of the will, see **WILLS**, 11; *Ib.*

MORTGAGE—See **CHATTEL MORTGAGE**; **SCHOOL FUND MORTGAGE**. When inferior to mechanic's lien, see **MECHANIC'S LIEN**, 2, 3; *Jenckes v. Jenckes et al.*, 624.

When does not amount to a voluntary assignment, see **VOLUNTARY ASSIGNMENT**; *Morgan et al. v. Worden et al.*, 600.

MUNICIPAL CORPORATION—See **ESTOPPEL**; *Rhodes v. Town of Brightwood*, 21.

Property within a municipal corporation is not exempt from taxation for the repair of free gravel roads within the county, see **TAXATION**; *Byram v. Board of Commissioners*, 240.

When land is dedicated to, see **DEDICATION**, 1, 2, 3; *Rhodes v. Town of Brightwood*, 21.

1. *Street Improvement.—Town Ordinance For.—Statutes Construed.*—A town may, by ordinance, require property-owners to pave sidewalks with brick, stone, or cement, under sections 4394 to 4397, Burns' R. S. 1894 (3357 to 3360, R. S. 1881), notwithstanding the grade therefor had been established years before, and board sidewalks laid thereon at such time.

Keith et al. v. Wilson et al., 149.

2. *Street Improvements.—Town Boards May Make with or without Petition.*—Under sections 4394 to 4397, Burns' R. S. 1894 (3357 to 3360, R. S. 1881), the board of trustees of towns may improve sidewalks without petition from the adjacent property-owners, when in the opinion of such board of trustees public convenience requires such improvements to be made. *Ib.*

3. *Refunding Bonds.—Statute Construed.*—Under act of March 3, 1877, authorizing the funding of city indebtedness, funding bonds which have passed into the hands of innocent and good-faith purchasers, are not subject to defense by the city, and, as a *bona fide* indebtedness, are subject to be refunded.

Myers v. City of Jeffersonville et al., 431.

4. *Constitutional Amendment.—Municipal Indebtedness.*—The constitutional amendment of March 14, 1881 (section 220, Burns' R. S. 1894), limiting the amount of indebtedness to be incurred by municipalities to two per cent. of the taxable property, does not render invalid prior indebtedness exceeding that limit, nor deny the right of a city so indebted to refund such debt by the issue of new bonds. *Ib.*

5. *Courthouse.—County Seat Removal.—Injunction.*—Money borrowed by a city to defray the expense of litigation, involving the removal of a county seat, and the cost of a lot and the building of a courthouse and jail for a county, is unauthorized; and bonds issued to secure the money so borrowed have not such validity in the hands of any holder as to preclude a citizen and taxpayer from the right of injunction to prevent the refunding of such bonds. *Ib.*

MUNICIPAL DEBT—See MUNICIPAL CORPORATIONS, 4; *Ib.*

Money borrowed by city to defray the expense in the removal of a county seat and the construction of a courthouse and jail for a county is unauthorized, see MUNICIPAL CORPORATIONS, 5; *Ib.*

MURDER—See CRIMINAL PROCEDURE, 2; *Drake v. State*, 210.**NEGLIGENCE**—

1. *Liability of Contractor to Third Party For*.—A contractor is not liable to a third party, to whom he owed no duty, who was killed by a falling building which was remodeled and reconstructed by such contractor, in a careless and negligent manner, about two years prior to the time of the disaster, and which fell, by reason of such negligent and imperfect reconstruction.
Daugherty v. Herzog, 255.

2. *Proximate Cause of Injury*.—Where a railroad company negligently obstructed a public street of a city with a train of cars, thereby preventing travel across such street for an unreasonable length of time, such obstruction was not the proximate cause of an injury received by a pedestrian who, without negligence in passing around such obstruction, caught her foot on a stone, lying across the gutter between the street and sidewalk, and was injured.
Enochs v. Pittsburgh, etc., R. W. Co., 636.

NEW TRIAL—When cause for is based upon the alleged misconduct of a juror, see TRIAL, 5; *Roose v. Roose et al.*, 162.

1. *Complaint*.—*Newly-Discovered Evidence*.—In an action to obtain a new trial, on the ground of newly-discovered evidence, all the facts essential to the validity of the complaint must be set out in the body of the complaint. The pleadings and evidence in the original case, though referred to and made a part of the complaint, cannot be considered.
Davis v. Davis et al., 4.
2. *Complaint*.—*Newly-Discovered Evidence*.—*Due Diligence*.—A complaint in an action for a new trial, on the ground of newly-discovered evidence, must state the facts constituting the diligence used to obtain the evidence before the trial. The mere statement that inquiries were made, is not sufficient.
Ib.
3. *Complaint*.—*Newly-Discovered Evidence*.—In an action for a new trial, by reason of newly-discovered evidence, where a deposition of a witness introduced in the original cause has been lost, an allegation in the complaint that such deposition is lost, with a substantial statement of the evidence, is sufficient; but such averments must be established by proper evidence at the trial of the issues joined on the complaint for a new trial.
Ib.
4. *Excessive Damages*.—*Tort*.—Excessive damages is a cause for a new trial in cases of tort only.
Marvin et al. v. Sager, 261.
5. *Failure of Counsel to Argue*.—*Error Waived*.—Where counsel for appellant fail to argue an error assigned it will be considered waived.
Ib.

NEWSPAPER—When of general circulation, see SERVICE BY PUBLICATION; *Lynn v. Allen*, 584.**NICHOLSON LAW**—See LIQUOR LICENSE; INTOXICATING LIQUORS; CONSTITUTIONAL LAW, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14; *Thompson v. Hiatt et al.*, 530; *Collins v. Marvil et al.*, 531; *Castle v. Bell et al.*, 8; *Flynn v. Taylor et al.*, 533; *Wilson et al. v. Mathis*, 493; *State v. Gerhardt*, 439.

Title of act is germane to the subject and not in contravention of Art. 4, section 19, of the constitution, see **INTOXICATING LIQUORS**, 4; *State v. Gerhardt*, 439.

NOTICE—See **CONSTRUCTIVE NOTICE**.

When the debtor is in failing circumstances the filing of notice of a mechanic's lien is dispensed with, see **MECHANIC'S LIEN**, 4; *Jenckes v. Jenckes et al.*, 624.

OFFICERS—

1. See **STATE OFFICER**.—*Vacancy in Office of City Treasurer*.—*Tenure of Appointee*.—*City Council*.—*Statutes Construed*.—Where, under section 8483, Burns' R. S. 1894 (3050, R. S. 1881), a person is elected by a city council to fill a vacancy in the office of city treasurer, caused by the death of the regularly elected incumbent, he is, under section 7583, Burns' R. S. 1894 (5567, R. S. 1881), entitled to the office for the entire unexpired term for which his predecessor was elected. *Carson v. State, ex rel.*, 348.
2. *Township Trustee*.—*Failure to File Bond within Time Required by Law*.—*Statute Construed*.—A township trustee, elected at the general election in November, 1894, whose term of office might have begun at any time within ten days after his election, does not forfeit the office by failing to file his bond and oath of office within ten days after his election as required by section 7542, Burns' R. S. 1894 (5527, R. S. 1881). *Albaugh v. State, ex rel.*, 356.
3. *Township Trustee*.—*Failure to Qualify*.—*Compensation*.—A township trustee who, through his own mistake and that of others as to the time when his term of office rightfully began, failed to qualify till after such time, is entitled to compensation only from the time he lawfully qualified and was rightfully entitled to the office. *Ib.*
4. *County Treasurer*.—*Loaning County Funds*.—A county treasurer, who loans the county funds, in violation of section 2019, Burns' R. S. 1894 (1942, R. S. 1881), cannot maintain an action for the recovery of the same; although the county itself might maintain such action. *Winchester Electric Light Co. v. Veal*, 506.

OPINION EVIDENCE—When witness may give an opinion as to the value of particular services rendered, see **EVIDENCE**, 8; *Jenney Electric Co. v. Branham*, 314.

PARENT AND CHILD—Custody of child, see **HABEAS CORPUS**; *Hussey v. Whiting*, 580.

Presumption of fraud in business transactions between them, see **PRACTICE**, 6; *Teegarden et ux v. Lewis, Admr.*, 98.

1. *Custody of Minor Child*.—*Welfare of Child*.—Ordinarily the parent is entitled to the custody of his minor child; but where the welfare of the child is retarded by the custody of the parent, an exception to the ordinary rule exists. *Hussey v. Whiting*, 580.
2. *Parent's Oral Agreement as to Custody of Child*.—An oral agreement, express or implied, made by a parent, that another should have the custody of his child during infancy, will not preclude the parent reclaiming such child. *Ib.*

PARI MATERIA—As to construction of statutes, see **CONSTITUTIONAL LAW**, 13; *State v. Gerhardt*, 439.

PARKS—How affected by annexation to town or city, see DEDICATION, 4; *Rhodes v. Town of Brightwood*, 21.

Lands dedicated as, see DEDICATION, 1, 2, 3; *Ib.*

PAROL EVIDENCE—In contradiction of a recorded plat of land, see DEDICATION, 2; *Ib.*

Cannot be introduced in contradiction of a written compact, see EVIDENCE, 5; *Smith et al. v. Pedigo et al.*, 361.

PARTIES—When co-parties must be joined in an appeal, see APPELLATE PROCEDURE, 25; *Roach v. Baker et al.*, 330.

All parties to a judgment must be made parties in the assignment of error, see APPELLATE PROCEDURE, 27; *Moore v. Franklin et al.*, 344.

PARTNERSHIP—See RECEIVERSHIP, 1; *Davis v. Niswonger*, 426.

Action for Dissolution.—*Sale of Mortgaged Property Under Foreclosure.*—A foreclosure sale of all the property of a partnership effects its dissolution; and an action cannot thereafter be maintained for dissolution. *Ib.*

PETITION—To tile open drain, how signed, see DRAINAGE, 4; *Poundstone et al. v. Baldwin*, 139.

PLEADING—When a complaint contains sufficient allegations to show waste, see LANDLORD AND TENANT, 1; *Bucklen v. Cushman*, 51.

Original paragraphs of a pleading which have been superseded by amended ones will not be reviewed by the Supreme Court, see APPELLATE PROCEDURE, 83; *Hedrick et al. v. Whitehorn et al.*, 642.

1. *Complaint.*—*Sufficiency Of.*—*Breach of Contract.*—A complaint alleging that plaintiff and defendant had been partners in business; that defendant for a certain consideration offered to surrender his interest in the firm to plaintiff, and not to engage in the business in the town so long as plaintiff continued in the business in said town; and for these considerations consummated the trade and fully complied with the agreement, sufficiently alleges a contract on defendant's part not to engage in such business.

O'Neal v. Hines, 32.

2. *Complaint.*—*Injunction.*—*Damages.*—*Township Trustee.*—In an action to enjoin a county treasurer from collecting the expense of cleaning out and repairing an allotment of a public ditch, an allegation in the complaint that the plaintiff cleaned the allotment to the depth originally established, for the year for which it is claimed the township trustee cleaned the same, does not negative the legal right of the latter to clean the ditch for that year, in the absence of an allegation that plaintiff's work was to the acceptance of the trustee, as the trustee may determine that an allotment has not been properly cleaned out and repaired, and his decision made in good faith is final.

Zimmerman, Treas., v. Savage, 124.

3. *Collateral Attack.*—*Former Adjudication.*—*Injunction.*—*Drainage.*—A suit to enjoin the collection of a portion of an additional ditch assessment, the correctness and legality of which have been adjudicated, is a collateral attack, and cannot be sustained on the ground that the original assessment should have been deducted therefrom.

Duncan v. Lankford, Treas., 145.

4. *Common Count. — Recovery. — Evidence. — Contract. — Plaintiff* may plead the common count and recover, notwithstanding the evidence discloses a special contract.
Jenney Electric Co. v. Branham, 314.
5. *Answer. — Abatement.*—An answer which pleads matter in abatement, along with matter in bar, and asks judgment on the merits, thereby waives the matter in abatement. *p. 323.*
Smith et al. v. Pedigo et al., 361.
6. *Complaint in Action to Cancel Deed.*—In an action to cancel a deed, executed by a person of unsound mind, allegations of tender to the grantee of the consideration paid, of a demand for a deed of reconveyance, and of knowledge on the part of the grantee that his dealings were with one *non compos mentis*, are sufficient.
Thrash et al. v. Starbuck et al., 673.
7. *Complaint. — Tender.*—Where a grantee procures a conveyance, with the knowledge that the grantor is a person of unsound mind, a tender of the purchase-price is not a necessary prerequisite to a suit to annul such conveyance. *Ib.*

POLICE COURT—

1. *Jurisdiction. — Petit Larceny. — Indianapolis City Charter. — Statute Construed.*—Sections 8887-8891, Burns' R. S. 1894, as amended by the Act of 1895, p. 90 (Indianapolis City Charter, sections 116-120), conferring upon the police judge original concurrent jurisdiction with the criminal courts in all cases of petit larceny, and all other violations of the laws of the State where the penalty provided therefor cannot exceed a fine of \$500.00 and imprisonment not exceeding six months, is valid.
Stevens v. Anderson, 304.
2. *Jurisdiction. — Criminal Law. — Indianapolis City Charter. — Statute Construed.*—The jurisdiction of the police court, authorized by section 118 of the Indianapolis City Charter, empowering it to impose a fine and imprisonment, is not affected by the fact that the general statute fixes the punishment for petit larceny at imprisonment, fine and disfranchisement. *Ib.*
3. *Right of Trial by Jury. — Constitutional Law.*—The right of trial by jury guaranteed by the constitution, is not violated by the statute empowering the police judge, in case he shall deem the punishment he is authorized to assess, inadequate for the offense, to hold the prisoner to bail for appearance before the proper court. *Ib.*

POLICE POWER—Authority of the State is exercised by virtue of, in drainage of wet lands, see DRAINAGE, 7; *Gifford Drainage District et al. v. Shroer et al., 572.*

When a Legislative, and When a Judicial Question.—It is the province of the legislature to decide when the exigency exists for the exercise of the police power of the State, but as to what are the subjects which come within it, is a judicial question. *p. 451.*
State v. Gerhardt, 439.

POSSESSION—Continued possession by the husband of personal property sold to his wife as evidence of fraud against creditors, see FRAUDULENT CONVEYANCE, 1, 2; *Higgins v. Spahr et al., 167.*

POST-NUPTIAL CONTRACT—As to inchoate interest in husband's real estate, see DIVORCE, 3; *Hilbish v. Hattle, 59.*

PRACTICE—When erroneous instruction given is not reversible error, see INSTRUCTIONS TO JURY, 8, 9; *Pigg v. State*, 560.

The Supreme Court considers only the inferential or ultimate facts in a special finding, see SPECIAL FINDING, 2; *Morgan et al. v. Worden et al.*, 600.

Refusal to give requested instructions when not available error, see INSTRUCTIONS TO JURY, 5; *Wilson v. Johnson*, 40.

When not available error in overruling a demurrer to a bad pleading, see HARMLESS ERROR, 1; *Thrash et al. v. Starbuck et al.*, 673.

When sustaining a demurrer to a counter-claim is not available error, see HARMLESS ERROR, 2; *Clause Printing Press Co. v. Chicago Trust and Savings Bank*, 682.

Defendant is not required under the general denial to negative the truth of the plaintiff's *prima facie* case by a preponderance of the evidence, see EVIDENCE, 6; *Young et al. v. Miller et al.*, 652.

1. *Harmless Error.—Special Finding.*—The erroneous overruling of a demurrer to a paragraph of the complaint is harmless, where the special finding follows and sustains the allegation of another paragraph, which is sufficient. *O'Neal v. Hines*, 32.

2. *Motion in Arrest of Judgment.—Dismissal by Court.*—Dismissal of a cause by the court on motion in arrest of judgment for insufficiency of complaint, after a demurrer has been overruled and an exception reserved without allowing an amendment, is error. *Bucklen v. Cushman*, 51.

3. *Special Verdict.—Mental Capacity of Donor.—Gift.*—On the issue as to whether a donor had sufficient mental capacity to make a valid gift *inter vivos*, a finding in a special verdict that the donor was of unsound mind, is a mere conclusion of law and not such a statement of facts as that the court could apply the proper legal conclusions and render judgment. *Teegarden et ux. v. Lewis, Admr.*, 98.

4. *Unsoundness of Mind.—Burden of Proof.*—One who challenges the mental capacity of a testator, or donor, has the burden of establishing the absence of the particular capacity in issue. *Ib.*

5. *Fiduciary.—Burden of Proof.*—One occupying a fiduciary relation must, when the question is made, establish his right in equity and good conscience to any advantage gained by him from or through his principal, or his principal's business. *Ib.*

6. *Parent and Child.—Presumption of Fraud.—Onus of Proof.*—The relation of parent and child, as to presumption of fraud and the *onus* of proof to rebut the same, in business transactions between them, does not stand upon the same footing as the relation of trustee and *cestui que trust*, guardian and ward and the like relations. *Ib.*

7. *Criminal Procedure.—Discharge of Juror After Submission.*—After the acceptance of the jury, and after they are sworn to try the cause, it is too late to examine them as to their competency, or to peremptorily challenge any of their members, unless there be first interposed a motion to set aside the submission. *Kurtz v. State*, 119.

8. *Jurisdiction.—Amended Petition.*—Where the court has acquired jurisdiction over the parties to the original petition, it has authority to allow an amended petition, even though the original was not good on demurrer. *Poundstone et al. v. Baldwin*, 139.

